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IN THE

Supreme Court of the United States

October Term, 1982

ELLEN SCHALL, as Commissioner of the New York City Department of Juvenile Justice,

Appellant,

and

ROBERT ABRAMS, as Attorney General of the State of New York,

Intervenor-Appellant,

against

GREGORY MARTIN, LUIS ROSARIO, KENNETH MORGAN, and all others similarly situated,

Appellees.

On Appeal from the United States Court of Appeals for the Second Circuit

BRIEF FOR INTERVENOR-APPELLANT

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Questions Presented

1. Does the standard permitting court-ordered detention of an accused juvenile delinquent in New York Family Court Act § 320.5(3)(b), a judicial finding of serious risk of pretrial crime supported by facts and reasons stated on the record, satisfy a detained juvenile's right to due process of law?

2. Do the procedural protections an accused juvenile delinquent receives at initial appearance, which include all the protections available at arraignment in New York, and the finding of probable cause after adversary hearing he is entitled to receive within six days of a detention order afford a juvenile detained under § 320.5(3)(b) due process of law?

3. Does § 320.5(3)(b) deny accused juvenile delinquents due process of law if the criminal charges against some of the juveniles detained under the statute are subsequently withdrawn or dismissed and the dispositional orders for others, who are adjudicated delinquent, do not require them to be sent away from home?

4. May a federal writ of habeas corpus release accused juvenile delinquents from pretrial detention who were not ordered detained or in custody until after the writ was granted?

Parties

The caption includes the names of the parties in the court that issued the judgment on appeal except that appellant Ellen Schall, as Commissioner of the New York City Department of Juvenile Justice, has been substituted for Paul Strasburg, as Commissioner of the New York City Department of Juvenile Justice, the respondent-appellant below. Former Commissioner Strasburg resigned his office on November 17, 1982. Ms. Schall was appointed Commissioner on December 28, effective on January 10, 1983.

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Opinions and Judgments Below

The majority and concurring opinions and the judgment of the Court of Appeals (A. 95-123*) are reported *sub nom. Martin* v. *Strasburg* at 689 F.2d 365 (1982).

The June 1, 1981 judgment of the United States District Court for the Southern District of New York (A. 93) and its August 5 clarifying memorandum (A. 94) are not reported. The April 17, 1981 opinion of the district court in support of the judgment (A. 36-92) is reported *sub nom. United States ex rel. Martin* v. *Strasburg* at 513 F. Supp. 691 (1981). The April 3, 1978 interlocutory opinion of the district court (A. 20-32) is not reported.

Jurisdiction

Jurisdiction is conferred by 28 U.S.C. § 1254(2). The judgment on appeal (A. 95) is from the United States Court of Appeals for the Second Circuit, and it held New York Family Court Act § 739(a)(ii), now § 320.5(3)(b), invalid under the due process clause of the Constitution.

The Court of Appeals filed its judgment on September 20, 1982. A. 7. Intervenor-appellant Abrams filed his notice of appeal (A. 124) on October 20. A. 7. On December 10, this Court extended the time in which to docket the appeal from December 20, 1982 to January 24, 1983. Supreme Court Order No. A-521; Supreme Court Rule 29(1). Intervenor docketed his appeal (No. 82-1278) on January 24, and appellant Schall docketed her appeal (No. 82-1248) on that date. On April 18, this Court noted probable jurisdiction over both appeals and consolidated them. —— U.S. ——, 103 S.Ct. 1765.

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* References preceded by "A." are to pages in the joint appendix filed on this appeal.

State Statute Involved

New York Family Court Act § 320.5 states in part:

> *The initial appearance; release or detention*
>
> 1. At the initial appearance, the court in its discretion may release the respondent or direct his detention.
>
> • • •
>
> 3. The court shall not direct detention unless it finds and states the facts and reasons for so finding that unless the respondent is detained:
>
> • • •
>
> (b) there is a serious risk that he may before the return date commit an act which if committed by an adult would constitute a crime.[*]

Statement of the Case

A. Pretrial Release or Detention under Family Court Act § 320.5 and Juvenile Delinquency Proceedings in New York

Pretrial release or detention under New York Family Court Act ("FCA" or "the Act") § 320.5 is decided at an accused delinquent's initial appearance in Family Court. FCA § 320.4(2)(a).* Initial appearance follows the filing

[*] Section 320.5 was enacted by L. 1982, c. 920, § 1, eff. July 1, 1983 (1 McKinney's Session Law News of New York at 1982-148 [Jan. 1983]). Subsections 1 and 3(b), set forth above, repeat the relevant text of § 739(a)(ii), the statute involved before July 1. (The text of § 739[a][ii] in force between November 24, 1976 and July 1, 1983 is set forth in intervenor's jurisdictional statement, p. 2, and in McKinney's Consolidated Laws of New York, Book 29A-Judiciary [Part 1] Court Acts [1982-83 Supp.].) Section 739(a)(ii) was considered below only in relation to the pretrial detention of accused juvenile delinquents (A. 20-23, 30-32, 33-35, 36-92, 96-122), the context in which § 320.5 is now controlling.

* Sections 320.4 and 320.5 are included in article 3 of the Act. The article, entitled *Juvenile Delinquency*, was added by L. 1982, c. 920, § 1 (1 McKinney's Session Law News of New York at 1982-148 [Jan. 1983]), and amended by L. 1982, c. 926 (*id.* at 1982-255),

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of a delinquency petition and is required in all cases. FCA § 320.1.* If a juvenile is in detention, his initial appearance is within seventy-two hours or on the next court day after the petition is filed, whichever is earlier. § 320.2(1).** If a juvenile is not in detention, i.e. he was

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and by L. 1983, c. 398, §§ 1-50, all effective on July 1, 1983 (hereafter "article 3" or "the July 1, 1983 amendments"). Article 3 recodifies the delinquency provisions formerly in article 7, including § 739(a)(ii), now § 320.5(3)(b), the statute involved in this appeal, and revises some of them. Some new terminology is introduced. For example, initial appearances were formerly called "§ 739 hearings," "§ 739 detention hearings" or "arraignments" and are so variously identified in the proceedings below. (Other revisions of interest are noted in the ensuing discussion.) Under both prior and current law in New York, the specialized and principally habilitative purposes of the Family Court, the non-criminal character of delinquency proceedings and the need to provide the juveniles involved in those proceedings with due process of law are recognized. *See generally Eddings* v. *Oklahoma*, 455 U.S. 104, 116 n. 12 (1982); *In re Gault*, 387 U.S. 1, 14-15 (1967); *Kent* v. *United States*, 383 U.S. 541, 554-55 (1966).

* A delinquency petition must charge a juvenile between 7 and 16 (at the time of the conduct in issue) with one or more acts that would be crimes, i.e. felonies or misdemeanors, if committed by an adult. FCA §§ 301.2(1), 311.1(2), 3(c); New York Penal Law § 10.00(6). Facts supporting each element of the crimes charged and the juvenile's commission of them must be alleged and sworn to by a person, or persons, with direct knowledge of the events. FCA §§ 311.1(3)(h), (4), 311.2 (requirements codified by July 1, 1983 amendments). See testimony of Hon. Cesar Quinones ("Quinones"), A. 251-52 (pre-codification practice). For this reason, delinquency petitions in New York provide probable cause (§ 311.2[2]; *Gerstein* v. *Pugh*, 420 U.S. 103, 111-12, 120 [1975]), and must be dismissed if they do not. FCA § 315.1.

** A juvenile may be detained briefly after arrest and before initial appearance by police and local juvenile detention agencies like the New York City Department of Juvenile Justice administered by appellant. Police may detain only in special circumstances for a reasonable period, e.g. to complete questioning. FCA § 305.2(4)(b), (6), (8). Local juvenile detention agencies may detain (commonly following a police referral) if it appears the facts leading to the juvenile's arrest support a delinquency petition and several other conditions are met. The agency must find that there is a substantial probability the juvenile will not appear in court or a serious risk he will commit a pretrial crime, the two detention standards applied by the Family Court under the Act, *and* either the juvenile's conduct involved the use or threatened use of force or there is reason to believe that a delinquency proceeding is pending against him. FCA § 305.2(4)(c); Uniform Fam-

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not referred to or accepted by a local detention agency after his arrest (*see* p. 3 n.**), his initial appearance is within ten days after the petition is filed absent good cause shown. § 320.2(1). As at all hearings in New York Family Court, the juvenile is present at initial appearance and represented by counsel. §§ 320.2(2), 320.3, 341.2(1). He has the right to remain silent and to notification of his parents or the person responsible for his care ("the parent"), but the hearing may proceed without the parent after substantial efforts have been made to notify him. §§ 320.3, 341.2(3).* Initial appearance, again as all Family Court hearings, is stenographically recorded. *See* testimony of Hon. Cesar Quinones ("Quinones"), A. 252-54, 256, called by intervenor at the trial below, and of Steven Hiltz ("Hiltz"), A. 128, called by appellees.**

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ily Court Rules, 22 New York Codes, Rules and Regulations ("NY CRR") § 2507.1(c); 9 NYCRR § 180.7(d)(3) (detention agencies). *See* testimony of Michael Bigley ("Bigley"), A. 164, 175, and Ralph E. Kelly ("Kelly"), A. 286, 298-302, 305, both called by intervenor at the trial below. (At the time, Mr. Bigley was Director of Detention Services of the New York State Division for Youth [A. 154], and Mr. Kelley, Deputy Commissioner for Operations of the New York City Department of Juvenile Justice [A. 283].) *See also* State's Exhibits ("SX") B1, K, L, A. 331, Record on Appeal Document Number ("R. Doc.") 26 (New York City Department of Juvenile Justice materials used to screen juveniles for pre-court detention).

A juvenile detained by the police or a local juvenile detention agency is entitled to a '72 hour' or 'next day' court hearing even if a delinquency petition has not yet been filed. *See* FCA §§ 307.3(4), 307.4 (providing for pre-petition detention hearing with essentially the same procedural rights and the same detention standards as at initial appearance).

* In New York, juveniles and adults accused of crimes have essentially the same procedural and evidentiary rights. *See, e.g., People ex rel. Guggenheim (Robert P.)* v. *Mucci*, 32 N.Y.2d 307, 312, 313 (1973); *Matter of Gregory W.*, 19 N.Y.2d 55, 64 (1966); *Matter of Robert P.*, 40 A.D.2d 638, 638-39 (1st Dept. 1972). Thus, sections of the Family Court Act, including FCA §§ 320.2, 320.3, are construed in light of the New York Criminal Procedure Law ("CPL"), McKinney's Consolidated Laws of New York, Book 11A, which is controlling in the state's adult criminal courts. *See* FCA § 303.1.

** Judge Quinones had been on the New York Family Court bench for 10 years at the time of trial and had presided in all Parts, including Intake where initial appearances are held. A. 246-47. He had

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At the outset of his initial appearance, the juvenile, represented by counsel, is read the charges and provided with a copy of the delinquency petition. FCA §§ 320.3, 320.4(1). He may then challenge the sufficiency of the petition, e.g. for failure to provide probable cause (§§ 311.2 [2], 315.1; A. 255 [Quinones]; *see* p. 3 n.*), and pleads to it if it is not dismissed. §§ 321.1, 321.3* A representative of the presentment agency (a city corporation counsel, county attorney or district attorney) is in court to support the petition and to request the juvenile's detention under § 320.5(3) if he believes it necessary. § 301.2(12). A representative of the local probation service is also present. A. 128, 129 (Hiltz); A. 252-53 (Quinones). He may be the probation liaison officer to the court, the juvenile's own probation officer or the officer who interviewed him during probation's pre-court review of the case. A. 253 (Quinones).** The officer reports the juvenile's 'record,' i.e. his prior and

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also spent 26 months assigned to the New York City Criminal Court and was familiar with adult arraignments. A. 246, 259. He identified arraignments as procedurally similar to initial appearances in Family Court. A. 259.

Mr. Hiltz, an attorney, specialized in juvenile justice matters when he was with the Legal Aid Society in New York City. A. 128. He left the Legal Aid Society in June 1979, just before appellant's agency became operational. A. 139.

* A legally sufficient petition may also be dismissed at initial appearance. *See* FCA § 315.2 (dismissal in furtherance of justice). In addition, it may be adjourned in contemplation of dismissal (§ 315.3) or referred to the probation service (where the case was considered before the petition was filed) for adjustment, i.e. informal resolution resulting in dismissal. §§ 320.4(2)(b), 320.6 and p. 5 n.**.

** The local probation service conducts a pre-court review, or probation intake, in all delinquency cases. The review has fact-gathering, conciliation and advisory purposes. The juvenile's court and probation records are obtained and examined. Testimony of Hubert Benjamin ("Benjamin"), A. 142, 143-44, called by appellees at the trial below. (Mr. Benjamin had then been with the New York City Probation Department for 30 years. A. 141.) The juvenile is interviewed (if he waives his right to remain silent) by a probation officer who is an experienced social worker. A. 142, 145, 147-48 (Benjamin). The juvenile's parent, the complaining witness or victim, and the arresting officer are also interviewed if they are willing to appear.

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current Family Court and probation contacts, and any known police contacts. § 308.1(6); A. 254 (Quinones), testimony of Hubert Benjamin ("Benjamin"); A. 144, called by appellees at the trial below. *See* p. 5 n.**. The officer also reports any relevant information obtained from probation's pre-court review, e.g. the kind of supervision the juvenile receives at home, his response to it, his attendance at school, his special medical or developmental problems. A. 143-44 (Benjamin); A. 254 (Quinones).* The probation officer concludes by offering his agency's recommendation about the juvenile's pretrial release status. A. 143-44, 149-50 (Benjamin); A. 254 (Quinones). The recommendation is not required in designated felony cases.**

FCA § 308.1(11); A. 142 (Benjamin). During the review, probation may adjust, i.e. informally resolve, a suitable case with the consent of the complainant and juvenile (and the approval of the court and presentment agency if certain felonies are charged). FCA § 308.1(2)-(4), (8), (13); 22 NYCRR §§ 2507.3-2507.6; A. 143, 148 (Benjamin). Absent adjustment, probation reports the information it has obtained to the judge presiding at initial appearance (or at the pre-petition FCA § 307.4 hearing) and offers its recommendation about the juvenile's pretrial release. § 308.1(6); A. 143-44, 149-50 (Benjamin). None of the information probation obtains during its pre-court review may be admitted at fact-finding, the hearing which determines whether the juvenile committed the crimes alleged in the petition. §§ 301.2(6), 308.1(6).

* The judge presiding at initial appearance must order a medical examination of any juvenile he believes may be incapacitated because of mental illness, retardation or developmental disability. FCA § 322.1. Specialized proceedings follow. § 322.2.

** In New York, felonies are divided into six classes, A-I, A-II and B through E, according to the length of sentence. *See* I. Schwartz, *New York Sentence Charts 1983*, Charts I, II, V (with New York Penal Law, McKinney's Consolidated Laws of New York, Book 39). Designated felonies are a Family Court classification. FCA § 301.2(8). The Family Court designated felonies with their Penal Law felony classes, which include some, but not all, A-I through E felonies, are: (i) murder 1 (A-I), murder 2 (A-I), kidnapping 1 (A-I) and arson 1 (A-I), if committed by a juvenile 13, 14 or 15; (ii) manslaughter 1 (B), rape 1 (B), sodomy 1 (B), aggravated sexual abuse (B), kidnapping 2 (B) where the abduction involved the use or threat of deadly physical force, arson 2 (B), robbery 1 (B) and assault 1 (C), if committed by a juvenile 13, 14 or 15; (iii) attempted murder

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When a judge presiding at initial appearance decides whether to release or to detain a juvenile pending fact-finding, the hearing that determines if the juvenile committed the crimes alleged in the delinquency petition (FCA § 301.2[6]), he applies both the Act's general purpose section, 301.1, and its release and detention section, 320.5. Section 301.1 requires the judge (in all his delinquency decisions) to consider both the "needs and best interests" of the juvenile and the "need for protection of the community."* Section 320.5 provides the judge with the discretion to detain the juvenile but only within the express constraints it imposes on his decision-making. Subsection (3) of § 320.5 first establishes an express preference for release which the judge must overcome, i.e. the "court shall not direct detention unless" it makes certain findings. Subsection (3)(a) and (3)(b) then require him to find either a substantial probability the juvenile will not appear for fact-finding or a serious risk he will commit a crime before it is held, the specific subsection here involved. Subsection (3) further requires that "facts and

1 (B), attempted murder 2 (B), and attempted kidnapping 1 (B), if committed by a juvenile 13, 14 or 15; (iv) burglary 2 (C) and robbery 2 (C), if committed by a juvenile 14 or 15 and there has been a prior finding by the court that the juvenile previously committed an act which, if committed by an adult, would be robbery 2, assault 2 or any of the preceding designated felony acts, regardless of the juvenile's age at the time of the prior act; and (vi) any crime other than a misdemeanor committed by a juvenile at least 7 but less than 16, if there have been two prior findings by a court that the juvenile committed a prior felony.

* Both considerations were codified by the Juvenile Justice Reform Act of 1976. L. 1976, c. 878, § 2, eff. July 26, 1976. Judge Quinones testified that the need to protect the community is the preeminent consideration when detention is ordered on a finding of serious risk of pretrial crime, but that the juvenile's interests are also served by the order because he is kept crime-free during the detention period. A. 269-70. Judge Quinones also testified that the juvenile's needs become preeminent at the post-trial disposition stage when his long-term habilitation is considered. A. 279-80. The community's interest is also served at that time by the disposition's intended outcome.

reasons" for a finding under either the nonappearance or serious risk of crime standard be stated on the record.*

Both detention standards were enacted in 1962 with the Family Court Act. L. 1962, c. 686, eff. Sept. 1, 1962. Their adoption was in specific response to the problem of "routine" and "unnecessary detention" the Legislature found to exist under prior law. *Report of Joint Legislative Committee on Court Reorganization, No. 2—Family Court Act*, 1962 McKinney's Session Laws of New York 3428, 3438.** In 1976, the Legislature added the "facts and reasons" requirement for detention under either standard. FCA § 320.5(3), formerly § 739(a), as amended by L. 1976, c. 880, § 8, eff. Nov. 24, 1976. The amendment was intended to further the original purpose of the standards and to improve judicial decision-making "while providing a basis for review of the individual case, guidance for others who will later deal with the [juvenile] and legislative review of detention practices." Practice Commentary to FCA § 739, McKinney's Consolidated Laws of New York, Book 29A-Judiciary (Part 1) Court Acts (1982-83 Supp.) at 369.†

* The pretrial period considered under FCA § 320.5(3)(a) and § 320.5(3)(b) is the time between initial appearance, or the filing of a delinquency petition which immediately precedes initial appearance, and fact-finding for juveniles on release status. A. 259-63 (Quinones). Under the speedy trial guidelines (*see* § 310.2) in effect at the time of the trial below, the maximum period between petition, or initial appearance, then § 739 hearing, and fact-finding was 90 days. A. 260 (Quinones). The maximum period between initial appearance and fact-finding is now 120 days. *See* p. 11 n.**.

** Prior law permitted pretrial detention of juveniles in the interests of justice. It also allowed pretrial release with or without bail. Children's Court Act, L. 1922, c. 547, § 20, as amended by L. 1930, c. 393 (applicable outside New York City); Domestic Relations Court Act, L. 1933, c. 482, § 81 (applicable within New York City). Consideration of bail was eliminated in 1962 when the Family Court Act was adopted. *See also People ex rel. Wayburn (Richard L.) v. Schupf*, 47 A.D.2d 79, 81-82 (2d Dept. 1975) (Family Court without power under the Act to grant bail to juveniles).

† As appears from the preceding discussion, pretrial detention under FCA § 320.5(3)(a) and § 320.5(3)(b) is specific to New York's interests in delinquency proceedings, appearance for trial and protection of the community and the juvenile from the risk of criminal behavior in the interim. Removal of a juvenile from his home for his benefit, e.g. to treat him for mental illness, to protect him from abuse and neglect, is not involved, and is considered in the non-delinquency related provisions of the Act. *See* A. 157, 165, 167, 180-81 (Bigley); A. 268-70 (Quinones).

To decide if a detention finding under FCA § 320.5(3)(b), serious risk of pretrial crime, is warranted in a particular case, the judge presiding at initial appearance considers the nature and seriousness of the charges and whether they evidence a lack of self-control amounting to disregard for the safety or property of others; whether the charges will probably be proved at fact-finding; the juvenile's prior record, with special weight given to recent court and probationary contacts; the adequacy and effectiveness of the juvenile's supervision at home; his response to school authorities, if known; the time of day the alleged crime was committed as evidence of its seriousness and of the effectiveness of parental control; and any special circumstances, e.g. developmental disability, which are present. A. 263-67 (Quinones).* The relevant facts are provided by the delinquency petition, opposing counsel, the probation officer, the victim or complainant, the juvenile's parent and other interested persons who are present. The witnesses need not be sworn or subject to cross-examination, and hearsay inadmissible at fact-finding may be considered. The juvenile is entitled to challenge any information or recommendation and to offer proof and produce witnesses on his own behalf. A. 255-58 (Quinones). If, on the basis of facts and reasons so established, the pre-

* Judge Quinones testified that there are juveniles who repeatedly commit crimes and appear in Family Court, i.e. they are potentially detainable under FCA § 320.5(3)(b) and not under § 320.5(3)(a) (substantial probability of nonappearance). A. 250-51. He also testified, based on his 10 years on the Family Court bench, that the areas he considers, enumerated above, are common to the deliberations of his colleagues under § 320.5(3)(b). A. 264.

Hon. Margaret Driscoll, called as a witness by intervenor at the trial below, agreed that there are recidivist juveniles for whom pretrial preventive detention is appropriate. A. 311-12, 316, 325. She also testified that she relied on essentially the same considerations as Judge Quinones in deciding whether to release or detain juveniles accused of crimes under the Connecticut standard requiring strong probability of pretrial crime. *See* A. 319-22, 327-28. At the time of trial, Judge Driscoll had made some 1500 to 2000 decisions under the Connecticut standard in her 12 years on that state's Juvenile Court and Superior Court bench. A. 308-309, 315. She was then also Chairman of the Standards Committee of the National Advisory Committee on Juvenile Justice and Delinquency Prevention. A. 311, 322.

siding judge finds that there is a serious risk that the juvenile before him will commit a pretrial crime, he immediately issues a detention order.*

The detention order directs a local detention agency, like the New York City Department of Juvenile Justice ("DJJ") administered by appellant, to take custody of the juvenile. A. 18-19.** Agency personnel, not the Family Court, then decide whether the juvenile is to be detained securely or nonsecurely. A. 164-65 (Bigley); A. 286-87, 302 (Kelly).† No particular crime, or combination of crimes, alleged in the delinquency petition foreclose the nonsecure option (A. 182 [Bigley]; A. 301-302 [Kelly]), and all agency decisions must conform with state policy that juveniles who

* Pretrial detention orders are commonly reviewed by writ of habeas corpus brought in the state Supreme Court. The Supreme Court judgment is appealable as of right and may be taken directly to the Court of Appeals if only a constitutional question is presented. New York Civil Practice Law and Rules § 5601(b)(2). Permissive appeals may also be pursued to the Appellate Division, New York's intermediate appellate court, from the Family Court order. FCA § 365.2. Motions for reconsideration may be addressed to the Family Court at any time. § 355.1(1)(b).

** The detention facilities operated by the local agencies are certified, regulated, and partially funded by the state through its Division for Youth ("DFY"). New York Executive Law §§ 510-a, 530; FCA § 304.1(1); 9 NYCRR parts 174, 176, 180; A. 157-58 (Bigley). DFY operates only one detention facility directly. A. 157.

† Secure detention is in a locked facility which is self-contained, i.e. education, recreation, meals, counselling and medical care are provided on the premises. FCA § 301.2(4); 9 NYCRR § 180.9; A. 162 (Bigley); A. 285 (Kelly). Spofford Juvenile Center, the secure facility in New York City, and Monroe County Children's Center, the secure facility in that county, are shown in photographs included in the record on appeal. Petitioners' Exhibit ("PX") 31a-j, A. 331, R. Doc. 26 (Spofford); SX E1-23, A. 331, R. Doc. 26 (Monroe).

Nonsecure detention is in an open, community-oriented setting, e.g. in a group home or family boarding home. FCA § 301.2(5); 9 NYCRR § 180.10; A. 285 (Kelly). Education is provided by local schools. Supervision, monitoring of medical needs and meals are provided by the house parent. Social work services are provided by the local agencies.

need to be detained, be held in the least restrictive environment. 9 New York Codes, Rules and Regulations § 180.7 (d)(3); A. 174-75, 180 (Bigley).*

A detained juvenile is entitled to a probable cause hearing within six days (three calendar days plus one adjournment of three court days for good cause shown) of an order under FCA § 320.5(3)(a) or § 320.5(3)(b) if he denies the charges against him at initial appearance. § 325.1(2), (3), formerly § 739(b). He is also entitled to an expedited fact-finding within seventeen days (fourteen days plus one three day adjournment for the court or presentment agency for good cause shown) in class A, B and C felonies (*see* p. 6 n.**) and within six days (three days plus one three day adjournment for the court or presentment agency) for all other crimes. § 340.1(1), (3)(a).** If the time for

* In New York City, social workers in DJJ's Court Assessment Unit make the secure/nonsecure decisions on court-ordered detentions. A. 286, 288-89 (Kelly). They interview the juvenile and person(s) responsible for his care as well as probation officers and social workers who know him (if they are available). A. 286-87, 298 (Kelly). They review the circumstances of the current petition; the juvenile's court and probation history, including his prior detention experience; his medical and psychological problems; his school attendance, behavior and achievement (if available); and any other factors which bear on the appropriateness of secure or nonsecure detention and the juvenile's adjustment to it. A. 298-302 (Kelly); SX B2, A. 331, R. Doc. 26 (Court Assessment Unit Screening Form); SX I, A. 331, R. Doc. 26 (Guide for Preparing Court Assessment Unit Screening Form).

DJJ, like other juvenile detention agencies, also makes a secure/nonsecure decision for a juvenile it admits (for up to 72 hours) before a court appearance. *See* p. 3 n.**. A similar (but more abbreviated) case review made by experienced juvenile counselors precedes that decision. A. 298-302 (Kelly); SX B1, A. 331, R. Doc. 26 (Spofford Juvenile Center Screening Form); SX K, A. 331, R. Doc. 26 (Spofford Juvenile Center Screening Procedures Manual); SX L, A. 331, R. Doc. 26 (Spofford Juvenile Center Outline of Interview with Juvenile and Parent).

** The presentment agency is allowed additional, reasonable time if either homicide is alleged or the injuries a witness received prevent him from appearing in court. FCA § 340.1(3)(a). The detained juvenile is allowed an adjournment of up to 30 days in all cases for good cause shown. § 340.1(3)(b). Non-detained juveniles proceed to fact-finding within 120 days of initial appearance (60 days

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probable cause hearing and expedited fact-finding coincide, the two hearings are merged, and the judge there presiding must make the probable cause finding within the six day time constraint. § 325.1(2), (3). If the time for probable cause hearing and expedited fact-finding do not coincide, a separate probable cause hearing is conducted. §§ 325.1-325.3, formerly § 739(b). The presentment agency opens the hearing and offers evidence on every element of the crimes charged and the juvenile's commission of them. §§ 325.2(1)(a), 325.3(1). The juvenile has the right to testify on his own behalf, § 325.2(1)(b), and he may call witnesses and introduce evidence unless the presiding judge denies him the opportunity for good cause shown, e.g. protection of an informant's identity. § 325.2(1)(c). Witnesses are sworn (unless the oath would be excused at fact-finding) and are subject to cross-examination. § 325.2(2). Only non-hearsay evidence is admissible, except scientific reports and statements of accepted reliability may be received subject to the juvenile's objection and a ruling directing that the appropriate witness be produced for examination. § 325.2(3).* The hearing must be concluded within two days or the juvenile released from detention. §§ 325.2(4), 325.3(4).** If the presiding judge finds probable cause, he must also decide whether the juvenile's continued detention is necessary. § 325.3(3). FCA § 325.3(3) requires that decision be made under § 320.5, necessarily including the section's preference for release, the two detention standards of subsections (3)(a) and (3)(b), and the requirement

plus one adjournment of up to 30 days for the court or presentment agency and the juvenile for good cause shown). § 340.1(2), (3)(a), (b). The 60 and 30 days period were added by the July 1, 1983 amendments. Invoked to their outer limits, they extend the speedy trial guidelines effective in New York City at the time of the trial below from 90 days from petition or § 739 hearing. A. 260-61 (Quinones), to 120 days from initial appearance. *See* p. 8 n.*.

* The procedures followed at probable cause hearings in Family Court and proof required to support an affirmative finding are the same as at probable cause hearings on felony complaints in adult criminal court. *Compare* FCA § 325.2 *with* CPL § 180.60.

** The 2 court days are included in the 6 days that FCA § 325.1(2) and (3) allow between initial appearance and probable cause. *See* § 325.3(4).

that the facts and reasons supporting the application of either standard be stated on the record. *See* pp. 7-8.

A separate dispositional hearing follows a fact-finding adverse to the juvenile, i.e. a finding of proof beyond a reasonable doubt that he committed the crimes alleged in the delinquency petition. FCA §§ 301.2(7), 342.2(2), 345.1, 350.1-350.4.* If, on a preponderance of the evidence received, the presiding judge concludes that the juvenile then needs "supervision, treatment or confinement", he finds the juvenile to be delinquent and enters an appropriate dispositional order. §§ 350.3(2), 352.1(1).** In all but designated felony cases (*see* p. 6 n.**), the judge must select the least restrictive disposition available that is consistent with the needs and best interests of the juvenile and the need to pro-

* If a juvenile is in post-trial detention, the dispositional hearing in a non-designated felony case (*see* p. 6 n.**) must commence within 10 days of an adverse fact-finding. FCA § 350.1(1). The court or the presentment agency may adjourn the hearing for up to 10 days for good cause shown. § 350.1(3)(a). The juvenile may adjourn it for up to 30 days for good cause shown. § 350.1(3)(b). Dispositional hearings for detained designated felons and for non-detained juveniles must commence within 50 days of an adverse fact-finding. § 350.1(2). The same adjournments are available to the court, presentment agency and the juvenile. § 350.1(3)(b). Additional time may be allowed in special circumstances. § 350.1(5).

** At a dispositional hearing, the court, presentment agency and juvenile may call witnessess, and the parties and the local probation service may advise the court about specific dispositional alternatives. FCA § 350.4(1)-(8). The probation service is also heard on the diagnostic assessment and/or probation investigation it is required to conduct in felony cases and may, but need not, conduct in misdemeanors. §§ 350.4(1), 351.1(1), (2). A probation investigation includes inquiries about the juvenile's family situation, his school adjustment, his response to prior social work assistance and prior psychiatric and psychological reports. § 351.1(1). A diagnostic assessment includes psychological tests and psychiatric interviews to determine mental capacity, achievement, disabilities and emotional stability. It includes, as well, a clinical assessment of any situational factors which may have contributed to the juvenile delinquent conduct and, when feasible, expert opinion about the risk the juvenile is to himself or others to assist the court in deciding his need for restrictive placement. § 351.1(1). *See* p. 14 n.**.

tect the community. § 352.2(2).* In designated felony cases, the judge must decide if restrictive placement, permitted only in these cases, is required before he considers any other disposition. § 353.5(1).** The reason for particular dispositions must be stated on the record in all cases, and find-

* Four dispositions are authorized: discharge on conditions, e.g. attending school regularly, for up to one year (FCA §§ 352.2[1][a], 353.1); probation for up to two years plus one year in exceptional circumstances after a further hearing (§§ 352.2[1][b], 353.2); placement with a local commissioner of social services or DFY for initial periods up to 12 months (misdemeanors) and 18 months (felonies) (§§ 352.2[1][c], 353.3[3]); and placement with those agencies for transfer to a facility specializing in the care of mental illness, retardation or developmental disability for up to one year subject to a further hearing. §§ 352.2(1)(d), 353.4. Restitution (if the juvenile is over 10) up to $10,000 and/or service to the public may be incidents of any disposition. § 353.6.

Placements under FCA § 353.3 are usually out-of-home and, at the direction of the court or in the discretion of a local agency or DFY, may include periods in secure, limited secure and non-secure facilities. *See* § 353.3(2), (3), (9); Executive Law §§ 502-510, 527; 9 NYCRR parts 168, 170, 171. (They may also be made to the juvenile's own home or to the home of a suitable person. FCA § 353.3[1].) All secure programs are operated directly by DFY. No placement is for "confinement" as distinguished from "supervision" and "treatment". §§ 301.2(7), 352.1(1).

Initial placement periods under FCA § 353.3(5) may be extended by the court for one year periods after further hearings until the juvenile is 18 and thereafter, with his consent, until he is 21. FCA § 355.3. The juvenile may also be discharged early by the court after hearing (§§ 353.3[6], 355.1) or by the placement agency. *See* § 353.3(9).

** The appropriateness of a restrictive placement depends on judicial consideration of the nature and circumstances of the crime, the age of the victim, the injuries received, if any, and the juvenile's history, in addition to his best interests and the community's need for protection. FCA § 353.5(2). If ordered, the juvenile goes to DFY for an initial period of not less than 3 years (class B and C designated felonies) or 5 years (class A designated felonies and multiple designated felony offenders). §§ 352.2(1)(e), 353.5(4)(a)(i), (5)(a)(i), (6). At least the first 6 months of a 3 year restrictive placement must be in a secure facility and at least 6 months thereafter in a residential facility. § 353.5(5)(a)(ii), (iii). At least the first 12 months of a 5 year restrictive placement must be in a secure facility and at last 12 months thereafter in a residential facility. § 353.5(4)(a)(ii), (iii). If the court allowed additional time in post-trial detention because of special circumstances, e.g. completion of an especially complex diagnostic assessment (*see* p. 13 n.**), the

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ings are required for restrictive placement. §§ 352.2(3), 353.5(1). If, on a preponderance of the evidence received, the judge presiding at the dispositional hearing concludes that the juvenile does not need "supervision, treatment or confinement", he must dismiss the petition (without a delinquency finding or a dispositional order) notwithstanding the prior adverse fact-finding. § 352.1(2).

B. Claims and Proceedings in the District Court

Gregory Martin commenced this proceeding for declaratory and habeas corpus relief in the United States District Court for the Southern District of New York on December 21, 1977. A. 1. He was detained under FCA § 320.5(3)(b), then codified as § 739(a)(ii), and claimed that the statute denied him due process and equal protection of the laws. Record on Appeal Document Number ("R. Doc.") 1 ¶¶ 6, 8-11. More specifically, Gregory alleged that he was denied due process because § 320.5(3)(b) punished detained juveniles without trial and required a "prediction" (A. 33 ¶ 1) of the likelihood of pretrial crime that was both inherently irrational and overbroad in that it included first offenders and juveniles who posed risks of trivial pretrial crimes. A. 33-34, 62; R. Doc. 15 ¶¶ 3-6 (Proposed Conclusions of Law for Appellees).* Gregory alleged he was denied equal

time is credited to the 6 month or 12 month secure confinement. §§ 350.1(5), 353.5(7).

Initial restrictive placement periods may be extended by the court after hearing until the juvenile is 21. FCA § 353.5(4)(d), (5)(d). A juvenile placed for 5 years may apply to the court for early release after 3 years. § 353.5(4)(b). DFY cannot discharge a restrictively placed juvenile without a court order. § 353.5(4)(c)(iii), (5)(c)(iii).

Without extensions, the maximum restrictive placement is about half as long as the corresponding juvenile offender sentence from an adult criminal court and about one-third to one-half as long as the corresponding prison term for an adult first offender. *Compare* § 353.5 *with* Penal Law §§ 70.00, 70.02, 70.05.

* Neither Gregory, nor the two other named appellees, Luis Rosario and Kenneth Morgan, challenged the New York procedures that provide probable cause at detention but do not require it to be found affirmatively until after an adversary hearing held within 6 days of detention. *See* pp. 3 n.*, 5, 11-12.

protection of the laws because § 320.5(3)(b) permitted preventive detention of juveniles when New York statutes did not authorize preventive detention of adults. A. 33, 62. Federal jurisdiction was based on 28 U.S.C. §§ 2241, 2254, and class certification sought. A. 9; R. Doc. 1 ¶¶ 2, 4.

The New York Family Court judge presiding at Gregory's initial appearance on December 14, 1977 ordered him detained on finding a serious risk Gregory would commit a crime before fact-finding if released. Petitioners' Exhibit ("PX") 1a, A. 331, R. Doc. 26.* The "facts and reasons" FCA § 320.5(3) requires to support a detention finding are stated in Gregory's delinquency petition, verified by the victim of the crime (PX 1b, A. 331, R. Doc. 26), and in the initial appearance transcript. PX 1a. Briefly summarized, Gregory was charged with robbery 1, assault 2 and criminal possession of a weapon 2 for an incident in which he, with two others, allegedly hit a youth on the head with a loaded gun and stole his jacket and sneakers. Gregory had the loaded gun when he was arrested; he lied to the police about where and with whom he lived; and the incident occurred at 11:30 at night, an hour when the presiding judge believed a fourteen year old, Gregory's age at the time, should have been at home. Gregory apparently had no prior record, i.e. contacts with the Family Court, but he had been warned by the police after an earlier incident.** Gregory's adver-

* Partial records of the delinquency proceeding against Gregory Martin and partial records of the delinquency proceedings against 33 other juveniles ("the juvenile case histories") were received as Petitioners' Exhibits 1-28, 35 and 43 at the district court trial below. A. 331. (They are included in Record on Appeal Document Number ["R. Doc."] 26.) The exhibits contain the transcripts of each juvenile's initial appearance, the proceeding at which pretrial release status is decided. *See* pp. 2-10. The exhibits usually indicate the outcome of probable cause, fact-finding and dispositional hearings but, except for Gregory Martin's probable cause hearing, do not contain the transcripts of these hearings.

** Eleven of the 34 juvenile case histories provided by appellees, in addition to Gregory Martin, involve arguable first offenders, i.e. juveniles who had no known prior or substantial current Family Court con-

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sary probable cause hearing was held on December 19 (*see* §§ 325.1, 325.2 and pp. 11-12), and probable cause found on all of the crimes charged. PX 1a (second transcript).*

tacts at the time of the initial appearances included in the histories. Two involve a single criminal charge: Ancrum (PX 35a, b), age 15, robbery 2 (allegedly stole gold chain from youth's neck and beat him at 2 a.m., had another delinquency petition pending); and Peebles (PX 14a, b), age 15, attempted arson 2 (allegedly set fire to neighboring apartment at 12:30 at night, mother said she could not help him). Nine involve multiple criminal charges: Ascencio (PX 12a, b), age 14, arson 2, reckless endangerment 2 (allegedly set fire to manned subway token booth at 12:30 at night, mother said he was truant); Basnight (PX 10a, b), age 14, robbery 1 and criminal possession of a weapon 2 (allegedly stole purse at gunpoint at 8:00 at night, incident occurred very substantial distance from juvenile's home); Cox (PX 7a, b) and Forde (PX 7a, e), both 13, multiple robbery, menacing and weapons charges (allegedly stole bus passes at knifepoint and with physical force in repeated incidents on the same day); Cruz (PX 11a, b), age 14, attempted murder 2, assault 1, reckless endangement 1 (allegedly pushed 77 year old man down stairs and beat him, detained under § 320.5 [3][a] [nonappearance] in addition to § 320.5[3][b]); Delgado (PX 19a, b), age 15, murder 2, manslaughter, criminal possession of a weapon (allegedly knifed 13 year old to death); McArthur (PX 6a, b), age 15, menacing, criminal possession of a weapon (allegedly pointed loaded, cocked gun at 13 year old); Rodriguez (PX 12a, b), age 14, arson 2 and reckless endangerment (allegedly set fire to manned subway token booth [with Ascencio above] at 12:30 at night, mother said he was truant; juvenile testified at trial below [T. 15, R. Doc. 26B] that had been arrested before); Santiago (PX 13a, b), age 12, robbery 1, assault, criminal possession of weapon and of stolen property (allegedly stole purse from 71 year old woman, knocking her against a brick wall, probation service subsequently reported juvenile had committed prior similar acts).

Probable cause was provided for all of the crimes listed above at detention by delinquency petitions verified by persons with first-hand knowledge of the events or supported by a deposition of the same character. *See* p. 3 n.*. Probable cause was also found after adversary hearing (*see* FCA §§ 325.1-325.3 and pp. 11-12) except in the instance of Forde who was released from detention when a courtroom was not available for the hearing. PX 7f.

Exhibits referenced above were received at A. 331 and are included in R. Doc. 26.

* Gregory received an adverse fact-finding (except on the assault count) on December 29, after expedited trial. PX 1c, A. 331, R. Doc. 26. *See* FCA §§ 340.1(1), (3) and pp. 11-13. He was put on 2 years probation at disposition. PX 1d, A. 331, R. Doc. 26, and pp. 13-14.

Luis Rosario and Kenneth Morgan joined Gregory as named petitioners in the federal proceeding on March 31, 1978. A. 9-10. Both fourteen year old boys had been detained at their initial appearances because of their serious risk of pretrial crime. PX 2a (Rosario), PX 3a (Morgan), A. 331, R. Doc. 26. Luis was charged with attempted robbery 1 and assault 2 for an incident in which he, with four others, allegedly tried to steal wallets from two men, putting a gun to the head of one of them and beating both on the head, back and legs with sticks. PX 2b, A. 331, R. Doc. 26. Luis was on release status on another pending petition (for knifing a youth) at the time of his initial appearance; he had three other, prior delinquency contacts with the Family Court; the incident in question occurred at approximately 11:15 at night; and the probation service recommended his detention. PX 2a. Kenneth was charged with attempted robbery and attempted grand larceny for an incident in which he, with another, allegedly tried to steal money from a couple, threatening to blow their heads off, and grabbing them to search their pockets. PX 3b, A. 331, R. Doc. 26. Kenneth, like Luis, was on release status on another petition (for robbery and criminal possession of stolen property) at the time of his initial appearance; he had been arrested five previous times; and his mother had refused to come to court because Kenneth had been in trouble so often she did not want him home. PX 3a, A. 331, R. Doc. 26.* Probable

* "Facts and reasons" supporting detention under FCA § 320.5 (3)(b) that include substantial current and/or prior Family Court contacts, i.e. 'criminal records,' are presented by 19 of the 34 juvenile case histories in addition to those of Luis and Kenneth. Three involve a single criminal charge: Harris (PX 16a, b), age 15, criminal possession stolen property 2, two other pending petitions; Taylor (PX 16a, e), age 14, criminal possession of stolen property 2 (with Harris), one other pending petition and one prior contact; and McCain (PX 15a, b), age 15, assault 3, four prior contacts. Sixteen involve multiple criminal charges: Allen (PX 27a, b), age 12, attempted robbery 1 and assault 1, six prior contacts; Dunaway (PX 21a, b), age 13, petty larceny and criminal possession of stolen property, one prior contact; Fargas (PX 26a, b), age 14, robbery 2, grand larceny, menacing, criminal possession of a weapon and of stolen property, one other pending petition and five prior contacts; Gomez (PX 20a, b),

(footnote continued on next page)

cause was found after adversary hearing in both cases. PX 2c (Rosario), PX 3c (Morgan), A. 331, R. Doc. 26.*

On April 3, 1978, the district court certified Gregory, Luis and Kenneth as representatives of a class of "all juve-

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age 15, robbery, assault, grand larceny and criminal possession of stolen property, one other pending petition and two prior contacts; Gregoire (PX 23a, b), age 15, burglary 3 and criminal possession of stolen property 2, six prior contacts; Hanna (PX 4a, e), age 14, criminal trespass 3, criminal mischief 4, two prior contacts; Jenkins (PX 4a, b), age 15, burglary 3, criminal trespass 3, criminal mischief 4 (with Hanna above), two other pending petitions and one prior contact; Jacobs (PX 28a, b), age 14, robbery and grand larceny, two other pending petitions, one prior contact; Lopez (PX 24a, b), age 13, burglary 3, criminal mischief 4, petty larceny and criminal possession of stolen property, one other pending petition and four prior contacts; McLaughlin (PX 43a, b), age 14, burglary 3, criminal possession of stolen property 4 and grand larceny, one prior contact; Melendez (PX 17a, b), age 15, burglary 3, criminal trespass 3, criminal mischief 2, one other pending petition and two prior contacts; Nelson (PX 22a, b), age 15, petty larceny and criminal possession of stolen property, one prior contact; Parson (PX 18a, b), age 15, promoting gambling 2 and possession of gambling devices, seven prior contacts; Price (PX 5a, b), age 13, attempted robbery 2, attempted assault and criminal mischief, two prior contacts; Ramos (PX 8a, b), age 15, burglary 3, petty larceny, criminal mischief and criminal possession of stolen property 3, eight prior contacts; West (PX 25a, b), age 14, grand larceny, jostling, criminal possession of stolen property and resisting arrest, six prior contacts.

Eight of the 19 juveniles, in addition to Luis and Kenneth, were on release status on other pending petitions at the time of the initial appearances included in the histories: Allen (PX 27a); Fargas (PX 2[illegible]); Gomez (PX 20a); Jenkins (PX 4a); Lopez (PX 24a); McC[illegible] (PX 15a); Melendez (PX 17a); and West (PX 25a). Seven were on probation from prior adverse fact-findings at the time of the initial appearances included in the histories: Dunaway (PX 21a); Fargas (PX 26a); Hanna (PX 4a); Jenkins (PX 4a); Nelson (PX 22a); Ramos (PX 8a); and West (PX 25a). Three, Fargas, Jenkins and West, were both on release status on other pending petitions and on probation from prior adverse fact-findings at the time of the initial appearances included in the histories.

Exhibits referenced above were received at A. 331 and are included in R. Doc. 26.

* Probable cause was found on all the crimes charged against Luis. PX 2c, A. 331, R. Doc. 26. (Appellees' exhibits do not provide any information about him thereafter.) Kenneth received an adverse fact-finding (merged with his probable cause hearing, *see* pp. 11-12) on lower charges, harassment and petty larceny, after an expedited trial. PX 3c, A. 331, R. Doc. 26. He was placed with a local commissioner of social services for 18 months at disposition. PX 3d, A. 331, R. Doc. 26.

niles [accused of crimes] who are now being held or will be held before these proceedings are concluded in pretrial detention" under FCA § 320.5(3)(b), then § 739(a)(ii). A. 32.* The proceeding was tried in March, 1980. Appellees called two expert witnesses whose testimony has not been previously referenced, Leslie T. Wilkins, an expert in "criminology[,] . . . prediction of behavior and statistics" (A. 188), and Lynnwood David Zinn, M.D., a child and adolescent psychiatrist. A. 230. Both witnesses were asked if they thought the "predictions" of future crime in the initial appearance transcripts of thirty-two of the thirty-four juvenile case histories in evidence (PX 1a-28a, A. 331, R. Doc. 26) would be accurate. A. 188 (Wilkins); 234 (Zinn). Mr. Wilkins said their accuracy would be "minimal," identifying the principal difficulty as not knowing what information the presiding judge had used or what weight he had attached. A. 189;** Dr. Zinn also thought the "predictions" in the transcripts would "not be accurate" (A. 234) and gave two reasons: First, as a medical professional, he said he was not called upon to predict behavior but only to make an "assessment of likely response . . . to treatment." *Id.* Second, he said the transcripts did not sufficiently address situational factors which might,

* Appellees argued that class certification was necessary to avoid mootness. R. Doc. 3, pp. 7-8; R. Doc. 6, pp. 20-27. Intervenor opposed, arguing that appellees' claims were "capable of repetition yet evading review" and could be fully litigated under that doctrine without class certification. R. Doc. 5, pp. 9-11. Contrary to the statement in the April 17, 1981 district court opinion (A. 70 n.29), neither intervenor nor appellant moved to dismiss this proceeding or *People ex rel. Wayburn (Charles L.)* v. *Schupf*, 39 N.Y.2d 682 (1976) (upholding FCA § 320.5[3][b], then § 739[b], under the Fourteenth Amendment), as moot. They took exactly the opposite view in both cases. *Wayburn, supra*, at 686.

** Mr. Wilkins expressed a generalized preference for empirical prediction over subjective decision-making although he was aware that no accurate empirical model had yet been developed for 'predicting' juvenile pretrial crime. A. 189-209. He also admitted his bias against juvenile preventive detention, stating that he had a "moral objection" to it. A. 219, 220.

or might not, provide support for the juvenile if he were released. A. 234-35. Both witnesses agreed that at least the following factors were reliable or generally accepted bases for informed judgment about the risk of crime: prior criminal record, unstable behavior illustrated by truancy, and family environment. A. 217-21 (Wilkins); 242-44 (Zinn).* Dr. Zinn also agreed that there were "at least some juveniles who will continue to engage in criminal behavior until they are stopped by the intervention of some societal authority." A. 244.

The April 17, 1981 opinion of the district court holds FCA § 320.5(3)(b), then § 739(a)(ii), invalid under the due process clause, both on its face and as applied. A. 92. The opinion advances three arguments in support of the holding. A. 69-91. First, § 320.5(3)(b) is said to permit the exercise of standardless judicial discretion in predicting pretrial crime, an event which, according to the court, is not amenable to reasoned decision in any circumstance. A. 69-81.** Prospective decisions required in bail are distinguished on the ground that they are made after "hearings" where "all possible relevant information" is available. A. 82. Second, although not put in issue by appellees, the potential six day delay between detention under § 320.5(3)(b) and an affirmative judicial finding of probable cause is said to violate the presumption of innocence. A.

* Mr. Wilkins observed, in addition, that the likelihood of future crime increases with each successive crime (A. 218), that the peak period for recidivism is 3 to 6 or 9 months after release from incarceration (A. 200-201), and that it was "reasonable to infer" that the same peak period would apply to release following arrest and initial appearance in Family Court. A. 201-202.

** *Kent* v. *United States*, 383 U.S. 541 (1966), is cited as authority for the conclusion that FCA § 320.5(3)(b) permits the exercise of standardless discretion. A. 70. The statute's express "facts and reasons" requirement for detention is not mentioned at any point. The allegedly brief period for which pretrial crime is 'predicted' under § 320.5(3)(b) is repeatedly cited (A. 65, 68, 84, 86, 88, 91) as supporting the irrational nature of the required judicial decision. On each occasion, the district court confuses the pretrial risk of crime period, then 90 days, now 120 days (*see* pp. 8 n.*, 11 n.**) with time constraints for probable cause hearings and expedited trial for detained juveniles.

86-88. Third, § 320.5(3)(b) is said to impose punishment without trial. A. 88-91. The statute's acknowledged crime prevention purpose is found inadequate as an "alternative purpose" under *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963), on the ground that protecting the community from juvenile pretrial crime is indistinguishable from the purposes of the juvenile justice system as a whole. A. 90. Protecting the community is then accepted *arguendo* as an adequate "alternative purpose" under *Kennedy* v. *Mendoza-Martinez*, *supra*, but § 320.5(3)(b) found not "rationally . . . connected" to it because of the inability of judges to predict future crime. A. 90. The stigma that allegedly results from detention for unpredictable crimes and the potential six day delay in affirmative findings of probable cause are noted in further support of the punishment rationale. A. 89, 90-91.

The district court opinion rejects appellees' equal protection claim, finding FCA § 320.5(3)(b) not subject to scrutiny under the compelling state interest test. A. 63-68. Noting that the statute does differentiate between juveniles and adults, it concludes that such distinctions are "too ingrained" in the "network of laws that the states have devised to deal with the problems of the young—delinquency, neglect and care" to be considered under the heightened standard. A. 68.*

* The district court opinion says, in *dicta*, that FCA § 320.5(3)(b) would not survive strict scrutiny because New York's interest in the statute is inconsistent with the fact that the "overwhelming majority" of juveniles who are detained are put on probation or receive no 'sentences' at disposition. A. 65. This conclusion relies on 1977 tables from a court administration report (PX 38, A. 331, R. Doc. 26) and on similar tables (numbers 79-82) for 1979 (R. Doc. 26) which the district court obtained on its own initiative. These tables combine detentions under FCA § 320.5(3)(b) with detentions under § 320.5 (3)(a) (substantial probability of nonappearance) and do not match detentions with dispositions. They also combine pre-fact-finding detentions with post-fact-finding detentions. Additionally, the district court made extensive errors in classifying and transposing the data from the tables which materially affect its conclusions. *See* Brief for Intervenor-Appellant in the United States Court of Appeals for the Second Circuit, pp. 39-40, 53-55, detailing district court errors.

On June 1, 1981, the district court entered a declaratory judgment in conformity with its opinion and granted a writ of habeas corpus for the class. A. 93. In an August 5 clarifying memorandum, the court held that the writ was effective to release accused juvenile delinquents who entered appellant's custody after it issued and until the proceeding was concluded or until the judgment entered on June 1 was reversed. A. 94. An application by intervenor and appellant for a stay of the writ's future effect was denied by the Court of Appeals on September 22, 1982. A. 6.

C. Opinions of the Court of Appeals

The United States Court of Appeals for the Second Circuit affirmed the district court judgment (A. 93, 94 [August 5, 1981 clarifying memorandum]) insofar as it declared FCA § 320.5(3)(b), then § 739(a)(ii), facially invalid under the due process clause and allowed the future writ. A. 96, 113-14. The majority opinion (A. 96-116) opens its due process discussion with the observation that preventive detention, unlike failure to post bail or denial of bail, is not a recognized exception to the general rule that incarceration follows, rather than precedes, adjudication of criminal conduct. A. 109-10.* To allow it as an exception, the majority would require a showing of compelling government interest but finds it unnecessary to evaluate New York's interests in § 320.5(3)(b) in this light. A. 110-11. Under its reasoning, § 320.5(3)(b) is invalid, regardless of the strength of the state's interest in preventing juvenile crime, because the statute "is utilized principally, not for preventive purposes, but to impose punish-

* The decisions in *United States* v. *Edwards*, 430 A.2d 1321 (D.C. App. 1981) (en banc), *cert. denied* 455 U.S. 1022 (1982), and *Blunt* v. *United States*, 322 A.2d 579 (D.C. App. 1974), both upholding the District of Columbia adult preventive statute under the due process clause, are not mentioned by the majority at this point. *Edwards* is referenced earlier in the opinion to show that the District of Columbia statute permits detention if the accused adult is charged with a listed "dangerous crime" or "crime of violence" whereas FCA § 320.5(3)(b) permits detention if the accused juvenile is charged with a felony or misdemeanor. A. 101 n.15.

ment for unadjudicated criminal acts." A. 111. *In re Winship*, 397 U.S. 358 (1970), requiring proof beyond a reasonable doubt at trial in delinquency proceedings, is cited as authority for this conclusion. A. 109, 112-13.

The opinion's due process analysis relies on the theory that short-term preventive detention before trial is unconstitutional punishment if it is not followed by long-term post-trial confinement in a majority of cases. A. 111-14.* To apply the theory, the opinion matches supposed FCA § 320.5(3)(b) detentions with subsequent dismissals at, or before, fact-finding and with post-disposition releases and concludes that § 320.5(3)(b) detentions outnumber post-trial placements (used synonymously for post-trial confinement) in the "vast majority" of cases and thus constitute punishment. A. 103, 111, 112.** Three different punishment

* The six factor test cited by the district court (A. 89-90) to distinguish regulatory denials of pretrial liberty from unconstitutional punishment is not mentioned. *See Bell* v. *Wolfish*, 441 U.S. 520, 537-38 (1979); *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963); *United States* v. *Edwards*, 430 A.2d at 1331-33.

** The opinion (A. 102 n.18) uses two evidentiary sources for its comparisons, a study by the Vera Institute of Justice of 781 delinquency cases that were considered by New York City Family Court judges between April 1, 1977 and March 31, 1978 (Petitioners' Exhibit ["PX"] 44, A. 331, Record on Appeal Document Number ["R. Doc."] 26) and the 34 juvenile case histories (PX 1-28, 35, 43, A. 331, R. Doc. 26; *see* p. 16 n.*). Neither is suitable. The Vera Study does not simply provide an imprecise basis for the comparisons, as the opinion concedes (A. 102 n.18), it provides no basis at all. First, as the opinion notes (*id.*), the Study combines detentions that are relevant, i.e. those under FCA § 320.5(3)(b), with detentions that are irrelevant, i.e. those under § 320.5(3)(a) (substantial probability of nonappearance). No numerical (or other) means for distinguishing between the two kinds of detention, a constraint the comparisons require, is provided. Second, the Study does not report the number of pre-fact-finding detentions for the combined group followed by dismissals or post-disposition releases, other constraints on which the comparisons depend.

The 34 juvenile case histories also cannot be used to infer the relationships between FCA § 320.5(3)(b) detentions and dismissals or post-disposition releases for all delinquency proceedings in New York that the comparisons require. First, the 34 case sample is too small. *See Mayor* v. *Educational Equality League*, 415 U.S. 605, 620-21 (1974). Second, the sample is biased, i.e. it consists of delinquency proceedings from over a 3 year period (3/5/76 [Delgado, PX

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rationales are assigned. A. 111-12. Detentions under § 320.5(3)(b) followed by dismissals at, or before, fact-finding, are said to be punishment because they are based on weak or insufficient evidence (although probable cause is provided) and guilt is not determined. A. 111-12.*

19a] to 8/21/79 [Ancrum, PX 35a]) selected by appellees' attorneys with a view to prevailing in this case. In contrast, samples that support reliable numerical generalizations must be random. A. 216 (Wilkins). Third, the sample includes irrelevant data (which would further reduce its size if eliminated), i.e. 4 of the juveniles included, Cox (PX 7a), Delgado (PX 19a), Dunaway (PX 21a) and Forde (PX 7a), were detained before the "facts and reasons" requirement for detention under § 320.5(3)(b) became effective on November 24, 1976. *See* pp. 7-8, 12-13. Last, the 34 juvenile case histories were not offered by appellees for generalized numerical comparisons and were not evaluated by their expert statistician or the district court in that light. *See* A. 40-53 (district court review of case histories limited to anecdotal comments); A. 188-89, 193, 195-96 (Wilkins' comments limited to particular case histories; no statistical study offered). *See also* p. 22 n.*, noting that similar, erroneous numerical comparisons offered by the district court (A. 59-61, 64-65) (and eschewed by the majority, A. 102 n.18) relied on different evidence, i.e. PX 38, Tables 81-84, A. 331, R. Doc. 26 and the court's own exhibits, Tables 79-82, R. Doc. 26. Given these facts, the majority's comment that the intervenor conceded the "representativeness" of the case histories (A. 103 n.19) for the numerical comparisons the opinion offers for the first time, is clearly erroneous.

* The majority assigns this dismissal/punishment rationale to one-third of the juvenile case histories. A. 109. According to the exhibits appellees provided (which do not include the transcripts of fact-finding hearings), 11 of the 34 delinquency proceedings were dismissed at fact-finding. Five cases were dismissed because the complaining witness did not appear: Allen (PX 27c, witness afraid); Ancrum (PX 35d); Hanna (PX 4i); Jenkins (PX 4i); and McArthur (PX 6d, dismissed without prejudice). Three cases, Cruz (PX 11c), Lopez (PX 24c, d), and McLaughlin (PX 43d), were adjourned in contemplation of dismissal and dismissed when the juvenile satisfied the terms and conditions of the adjournment. *See* FCA § 315.3 and p. 5 n.*. One case, Parson (PX 18c), was dismissed because the petition was held not to allege a crime, and another, McCain (PX 15c, d), was dismissed because the prosecution did not prove its case beyond a reasonable doubt. Appellees' exhibits show that one case, Ramos (PX 8c), was dismissed but do not include the reason. The exhibits do not provide either the delinquency petition or any information after detention in one case, Maloney (PX 7), and do not provide any information after probable cause was found in another, Rosario (PX 2c).

Exhibits referenced above were received at A. 331 and are included in R. Doc. 26.

Detentions under § 320.5(3)(b) followed by adverse fact-findings and release at disposition on probation or without any 'sentence' are said to be punishment because the decision to detain was mistaken or the decision to release recognized that the juvenile had been punished enough by detention. A. 111-12.*

The alleged constitutionally proscribed result identified by the majority, i.e. more pretrial detentions under FCA § 320.5(3)(b) than post-trial placements, is attributed principally to facial and practical incongruities between § 320.5 (3)(b) and the disposition sections of the Family Court Act. A. 111-12. Section 320.5(3)(b) is said to have only a crime prevention purpose (A.101, 104-105) and to be sub-

* The majority assigns this release at disposition/punishment rationale to one-third of the juvenile case histories. *Compare* A. 103 and A. 111 ('punished' group is allegedly two-thirds of the 34 juveniles) *with* A. 109 (one-third is allegedly 'punished' by dismissals at, or before, fact-finding). According to the exhibits appellees provided (which do not include the transcripts of dispositional hearings), 11 of the 34 juveniles received adverse fact-findings and were "released," as the majority uses the term, all on probation. Seven received 2 years probation: Ascencio (PX 12f); Cox (PX 7c); Forde (PX 7g); Delgado (PX 19d); Martin (PX 1d); Rodriguez (PX 12d); and Santiago (PX 13d). Three received one year probation: Basnight (PX 10c); Gomez (PX 20d); and Melendez (PX 17d). One, Harris (PX 16d), received six months probation. The probations of Cox (PX 7c) and Melendez (PX 17c) were later revoked, and Cox was placed with the state Division for Youth ("DFY") for 12 months (PX 7c, d). Appellees' exhibits do not provide the subsequent disposition for Melendez. The exhibits also do not provide any information about the disposition for Fargas (PX 26) who received an adverse fact-finding.

Ten of the 34 juveniles (including Cox) received adverse fact-findings and were placed with DFY or local commissioners of social services ("CSS"). Two, Dunaway (PX 21d) and Peebles (PX 14d), were placed with DFY for 18 months. Two, Jacobs (Stipulation and Order ¶8, R. Doc. 17) and West (PX 25d), in addition to Cox, were placed with DFY for 12 months. Four were placed with CSS for 18 months: Gregoire (PX 23d); Morgan (PX 3d); Nelson (PX 22d); and Taylor (PX 16g). One, Price (PX 5c), was placed with CSS for 90 days (interim placement, absconded). Under the majority's reasoning, these 10 juveniles were not unconstitutionally punished when they were detained under FCA § 320.5(3)(b) before fact-finding. A.112.

Exhibits referenced above were received at A. 331 and are included in R. Doc. 26.

stantively and procedurally "unlimited" (A. 112, 114) because detention is permitted if a felony or misdemeanor is charged (A. 101), the serious risk of crime standard is set forth without other "criteria" (A. 102) and the "statute itself" does not include procedural safeguards (A. 101-102) although, as the majority observes, related sections do. *See* A. 98-99 (requirements for probable cause hearing and expedited trial noted), A. 104 (rights to counsel, parental notification, statements supporting release and stenographic record noted), A. 113 n.34 (right to petition providing probable cause noted as a matter of practice, now codified in §§ 311.1[3][h], [4], 311.2). Disposition sections, in contrast, are said to consider the best interests of the juvenile (A. 100, 106), to have more elaborate criteria and require more information (A. 100, 106) and to be applied more leniently because the juvenile may receive probation if an appropriate "treatment facility" is not available (A. 100-101, 108) or if he is thought to have spent enough time confined during detention. A. 106-108.* At the conclusion of

* The opinion misreads several provisions of the New York Family Court Act ("the Act") when it compares FCA § 320.5(3)(b) detentions with post-fact-finding dispositions. First, the best interests of the juvenile are not irrelevant under § 320.5(3)(b) and relevant at disposition under § 301.1 as the majority assumes. *See* A. 100 n.13 citing § 711, now § 301.1, and A. 101, 104-106. Section 301.1 states that "the needs and best interests" of the juvenile and "the need for protection of the community" are general purposes of the delinquency article of the Act. Thus, both considerations are involved in all judicial decisions under it. *See* pp. 7-8. (Judge Quinones' testimony on these points [quoted at A. 105 n.24, 106 n.25] is not opposed. *See* p. 7 n.*.) Second, if the § 320.5(3)(b) standard and the disposition standard are to be compared, the comparison is between § 320.5(3)(b) and § 352.1(1) (requiring a finding that the juvenile needs "supervision, treatment or confinement" for a dispositional order), not between § 320.5(3)(b) and § 301.1, the general purposes section. *Contrast* A. 100, 101, 104-106. *See* pp. 13-15. Third, the more elaborate "criteria", e.g. nature of the crime, the opinion suggests are required for disposition and not for § 320.5(3)(b) detention, are applicable by statute when restrictive 3 and 5 year placements for designated felons are considered. *See* A. 100 & n.12 citing § 753-a(2), now § 353.5(2), and p. 14 n.**. Fourth, while more information about the juvenile is available at disposition than at § 320.5(3)(b) detention, the diagnostic assessment the opin-

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its due process analysis, the majority also attributes the alleged proscribed result to conscious judicial choice, stating that Family Court judges "know" and are "well aware" that most of the juveniles they detain under § 320.5(3)(b) will either not go to fact-finding or will be released at disposition. A. 112, 114.*

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ion says is generally provided at disposition (A. 100, 106) is required by statute only when restrictive placements for designated felons are considered. *See* 100 n.7 citing § 750(3), now § 351.1, and p. 13 n.**. Fifth, the opinion draws a distinction between placements for treatment (A. 101, 108) and for incarceration (A. 103, 109, 112) and identifies all placements as restrictive placements at one point. A. 102 n.18. In New York, all placements (except home placements, *see* § 353.3[1]) involve both treatment and confinement in more or less secure environments. *See* p. 14 n.* & n.**. As noted above, restrictive placements are for designated felons and are in the most secure environment for the longest term. *See* § 353.5(4)(a)(ii), (5)(a)(ii) and p. 14 n.**. Delinquents who are not designated felons may also be placed in the most secure environment, but their placements are not characterized as restrictive. *See* § 353.3(3), (9) and p. 14 n.*. Last, while it is true, as the opinion infers from two sources outside the record, that a judge at disposition may find that the particular placement he prefers is not available (A. 100-101 & n.14, 108 & n.30), it is not true that a juvenile who needs a placement is denied one. *See* § 353.3(2), (4). *Contrast* A. 100-101, 108.

* The majority opinion gives limited consideration to the future writ of habeas corpus. A. 115-16. Two propositions, uncontested by intervenor, are noted. First, writs may be brought, in conformity with 28 U.S.C. § 2254, by individuals already "in custody" to challenge their future confinement. Second, writs may be brought on behalf of a class. A. 115. These propositions are then said to allow the instant writ, which, insofar as contested, purports to release class members detained under FCA § 320.5(3)(b) from June 2, 1981, the day after the writ issued, until this case is concluded on appeal. A. 93, 94 (August 5, 1981 clarifying memorandum). The "fact of potential custody" for these juveniles is cited as sufficient to meet the "in custody" requirement of § 2254. A. 115. Intervenor's view that allowing the writ prospective effect erroneously identifies habeas corpus relief with injunctive relief is noted but discounted for two reasons. First, injunctive relief is said to be available against the appellant under 42 U.S.C. § 1983, and the differences between the two remedies are considered immaterial therefor. A. 115, 116 n.36. Second, appropriate relief from the writ's prospective effect is said to be available by application for a stay, relief the Court of Appeals had already denied intervenor and appellant in this case. A. 6 (stay denied on 9/22/81) and p. 23. The Court is referred to the jurisdictional statement for intervenor-appellant, p. 26, here incorporated by reference, for his argument on this point.

The concurring opinion pursues a "traditional due process analysis." A. 117, 118.* The three factor test in *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976), is cited as providing appropriate guidance. A. 118. Applying the test, the opinion finds a juvenile's interest in pretrial liberty of "fundamental importance." A. 118. It then finds New York's crime prevention interest in FCA § 320.5(3)(b) of "great significance in general" (A. 118) but difficult to realize in particular cases because the likelihood of future crime is uncertain. A. 117, 118-21.** On reaching the third *Mathews* factor, risk of error and value of other procedures, the opinion observes that juveniles detained under § 320.5 (3)(b) receive the "traditional" procedural rights of notice and opportunity to be heard (A. 122 n.8) but finds the statute without "readily available limitations" that would reduce the risk of erroneous detention decisions. A. 121. Five alleged deficiencies are assigned: § 320.5(3)(b) does not particularize crimes charged or pretrial crimes; it does not, in terms, require an assessment of the juvenile's background, e.g. prior 'criminal record'; it does not require an affirmative finding about the likelihood the juvenile committed the crimes charged until the probable cause hearing provided three to six days after detention; and it does not include a standard of proof for the serious risk finding.

* The concurring judge opens his discussion by stating that he is "less certain" than the majority that the record discloses a "significant number" of detentions under FCA § 320.5(3)(b) that are mistakes or punishments. A. 117. The comment is more probing of the majority's analysis and its factual underpinnings (*see* pp. 24 n.**, 25 n.*, 26 n.*) than the stated degree of certitude reveals. The concurring judge expresses doubt about whether any of the detentions in the record, up to a "significant number," are proscribed. The majority finds not just a "significant number" proscribed but the "vast majority." A. 103, 111, 112, 116. The due process analysis it then offers depends on the acceptance of this numerical constraint and facts consistent with it. *See* pp. 24-26.

** The concurring opinion accepts New York's interest in preventive detention under FCA § 320.5(3)(b) as regulatory and constitutionally permissible for purposes of its analysis. A. 117 n.1.

A. 121-22. The opinion then concludes that § 320.5(3)(b) is invalid because it permits juveniles to be detained in the "unbridled discretion" of the Family Court, allegedly in "marked contrast" to adult preventive detention under the District of Columbia statute upheld in *United States* v. *Edwards*, 430 A.2d 1321 (D.C. App. 1981) (en banc), *cert. denied* 455 U.S. 1022 (1982). A. 122. The requirement that the "facts and reasons" in support of a § 320.5(3)(b) detention order be stated on the record of the juvenile's initial appearance in Family Court is not mentioned in the discussion.

Summary of Argument

Section 320.5(3)(b) of the New York Family Court Act, upheld under the due process clause by the New York State Court of Appeals in *People ex rel. Wayburn (Charles L.)* v. *Schupf*, 39 N.Y.2d 682 (1976), permits a state Family Court judge to detain a juvenile accused of criminal conduct pending trial on a finding that the juvenile presents a "serious risk" of pretrial crime. The detention finding may not issue except in circumstances that conform with, if they do not exceed, those held in *Kent* v. *United States*, 383 U.S. 541 (1966), to provide the process due a juvenile at a critical preadjudicatory stage of a delinquency proceeding. Under the terms of the statute, the detention finding, if warranted, is made at the conclusion of a juvenile's initial appearance before the Family Court and must be based on "facts and reasons" stated on the record of that hearing. The hearing proceeds on a probable cause delinquency petition, alleging specific crimes. The juvenile is represented by counsel, has the right to remain silent, and to challenge the sufficiency of the petition for failure to provide probable cause, among other reasons. He may also contest any information offered in support of his detention, and he may present information on his own behalf. If detained, the juvenile is entitled to an adversary probable cause hearing within a maximum of six days, at which the "facts and reasons" for his detention must again

be assessed as well as probable cause affirmatively found, and to an expedited trial on the crimes charged within seventeen days (except in extraordinary circumstances). The juvenile may also seek review of the detention decision by higher courts and rely on the full record of the detention hearing since it, like other Family Court hearings, is stenographically recorded.

The United States Court of Appeals for the Second Circuit read this statutory scheme as denying fundamental fairness to detained juveniles. According to the majority opinion, too few detained juveniles were later adjudicated on the crimes charged in their delinquency petitions, and too few of those who were adjudicated received long-term placements at disposition. According to the concurring opinion, the serious risk of crime standard did not adequately protect juveniles from the risk of erroneous judicial detention decisions. Both opinions omit consideration of the *Kent* due process standard and the New York statute's express "facts and reasons" requirement. Both also fail to observe that the process provided to detain a juvenile under the statute is sufficient to deny an adult pretrial release on bail. As a result, the opinions provide a juvenile with more due process than an adult receives although a juvenile's and an adult's interests in pretrial liberty are not equivalent.

ARGUMENT

Juveniles accused of crimes may be preventively detained under procedures that satisfy the due process test of fundamental fairness. New York's procedures for detention under Family Court Act § 320.5(3)(b) do so. The detention standard, serious risk of pretrial crime, is definite, and the protections detained juveniles receive, which include a reviewable record of the facts and reasons for detention and an adversary probable cause hearing within six days of detention, assure the procedural regularity of the short-term detention orders the statute permits.

A. Juveniles accused of crimes may be preventively detained for brief periods under fundamentally fair procedures.

The New York Court of Appeals upheld Family Court Act ("FCA") § 320.5(3)(b), then § 739(b), under the due process clause in *People ex rel. Wayburn (Charles L.)* v. *Schupf*, 39 N.Y. 2d 682 (1976).* The opinion identifies the brief preventive detention § 320.5(3)(b) permits with the administration of juvenile justice by New York's specialized Family Court (*id.* at 688-89; *see* pp. 2-15) and holds that the statute fairly reconciles "the legitimate interest of youth

* FCA § 320.5(3)(b), originally enacted by L. 1962, c. 686 (*see* p. 8), permits a Family Court judge to detain an accused juvenile delinquent before trial on finding, based on "facts and reasons" stated on the record, that there is a "serious risk" the juvenile will commit a pretrial crime. The "facts and reasons" record consists of a delinquency petition (and supporting depositions, if necessary) that provides probable cause (§§ 311.1[3][h], [4], 311.2) and a stenographic record of the proceedings at initial appearance. *See* pp. 2-4. If ordered, detention under § 320.5(3)(b) is brief. Unless a prosecution witness is disabled as a result of the juvenile's conduct, the presentment agency must proceed to fact-finding, i.e. trial, within a maximum of 17 days from the detention order in A, B and C felonies (except homicides) and a maximum of 6 days in all other cases. § 340.1(1), (3)(a) and pp. 11-12. The juvenile's need for detention is reassessed at the adversary probable cause hearing he is entitled to receive within a maximum of 6 days from the detention order. §§ 325.1(1), (3), 325.3(3) and pp. 12-13.

in their liberty . . . with their entitlement to protection and guidance" and "with the interest of society in its own protection. *Id.* at 691.* The state's interests in § 320.5(3)(b), protecting the community from pretrial juvenile crime and the juvenile from the consequences of criminal behavior, are found "compelling" and incapable of achievement by any means less restrictive than preventive detention. *Id.* at 689.** The juvenile's interest in pretrial liberty is recognized as "fundamental" and entitled to "constitutional" "protection". *Id.* at 686-87. But, as the Court observes, a juvenile's and an adult's interest in pretrial liberty are not the same. "Juveniles are in . . . earlier stages of . . . emotional growth [than adults], . . . their intellectual development is incomplete, . . . they have only limited practical experience, and . . . their value systems have not yet been clearly

* The principle that juveniles are not entitled to consideration of pretrial release on bail had long been established in the United States when *Wayburn* was decided. *Estes* v. *Hopp*, 73 Wash. 2d 263, 438 P.2d 205 (1968); *A.N.E.* v. *State*, 156 So. 2d 525 (Fla. 1963); *State ex rel. Peaks* v. *Allaman*, 51 Ohio Op. 321, 115 N.E.2d 849 (1952); *Cinque* v. *Boyd*, 99 Conn. 70, 121 A. 678 (1923); *Ex parte Sharp*, 15 Idaho 120, 96 P.2d 563 (1908). *See In re Gault*, 387 U.S. 1, 14 (1967); *Kent* v. *United States*, 383 U.S. 541, 555 (1966); *Pee* v. *United States*, 274 F.2d 556, 559 n.14, 563 (D.C. App. 1959). *See also L.O.W.* v. *District Court of Arapahoe*, 623 P.2d 1253, 1258 (Colo. 1981); *Morris* v. *D'Amario*, 416 A.2d 137 (R.I. 1980). Discretionary pretrial release of juveniles on bail was eliminated in New York in 1962 as part of the Legislature's response to the then perceived problem of excessive detention. *People ex rel. Wayburn (Richard L.)* v. *Schupf*, 47 A.D.2d 79 (2d Dept. 1976) (Family Court without power to grant bail). *See* p. 8 & n.**.

** The district court rejected the New York Court of Appeals' finding that New York's interests in FCA § 320.5(3)(b) were compelling (A. 63-66) but found them substantial enough to deny appellees' equal protection claim. A. 63-68. *See* p. 22. The Second Circuit concurrence found New York's interests in § 320.5(3)(b) to be significant in general but capable of erroneous application in particular cases. A. 118-21. *See* pp. 29-30. The Second Circuit majority assumed that preventive detention had to be justified by a compelling state interest in crime prevention and that New York could have that interest in § 320.5(3)(b), but it did not rule on the question because it found that the statute was used principally for punishment of unadjudicated acts, not crime prevention. A. 110-14. *See* pp. 23-24.

identified or firmly adopted." *Id.* at 687. "To the extent that self-restraint may be expected to constrain adults, it may not be expected to operate with equal force as to juveniles." *Id.* at 688.* The Court then strikes the constitutional balance in favor of § 320.5(3)(b). *Id.* at 689, 691.**

* Prior decisions of this Court have compared juveniles with adults in substantially identical terms. *Eddings* v. *Oklahoma*, 455 U.S. 104, 115-16 (1982) (death penalty for a 16 year old vacated because all mitigating factors were not considered) (Minority "is a time and condition of life when a person may be most susceptible to influence. . . . . Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature than adults . . . 'often lack[ing] the experience, perspective, and judgment' expected of adults," quoting *Bellotti* v. *Baird*, 443 U.S. 622, 635 [1979], which notes, in addition, that juveniles often lack the judgment "to recognize and avoid choices that could be detrimental to them."); *Ginsberg* v. *New York*, 390 U.S. 629, 649-50 (1968) (*Stewart*, J., concurring) (conviction for selling pornographic materials to minors upheld against First Amendment challenge) ("[A] child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees."); *Haley* v. *Ohio*, 332 U.S. 596, 599 (1948) (due process rights of 15 year old violated by police efforts to obtain confession) ("[A] mere child [is] an easy victim of the law. . . . He cannot be judged by the more exacting standards of maturity.").

** In upholding FCA § 320.5(3)(b), the *Wayburn* court notes the fact that New York law then did not (and still does not) have a "matching [preventive detention] counterpart" for adults accused of crimes. 39 N.Y.2d at 689. So far as intervenor's research discloses, only one case, *Blunt* v. *United States*, 322 A.2d 579 (D.C. App. 1974) (upholding District of Columbia statute under due process clause), had ruled directly on the preventive detention of adult citizens when *Wayburn* was decided. The District of Columbia preventive detention statute involved in *Blunt* was again considered and upheld recently in *United States* v. *Edwards*, 430 A.2d 1321 (D.C. App. 1981) (en banc), *cert. denied* 455 U.S. 1022 (1982) (procedures no more protective of the accused than those involved in detention under § 320.5 [3][b], held sufficient to satisfy the due process rights of adult detainees) (right to pretrial bail under the Eighth Amendment considered and rejected). *See also Hunt* v. *Roth*, 648 F.2d 1148 (8th Cir. 1981), *vac, and remanded as moot sub nom. Murphy* v. *Hunt*, —— U.S. ——, 102 S. Ct. 1181 (1982) (Nebraska constitutional provision prohibiting pretrial bail for accused violent sexual offenders invalidated as foreclosing judicial discretion to release on bail in appropriate cases)

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See Ingraham v. Wright, 430 U.S. 651, 675 (1977) (corporal punishment of minors without prior notice and opportunity to be heard upheld under flexible due process analysis which requires comparison of the particular governmental and private interests involved); *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972) (same due process analysis applied to adult parole revocation); concurring opinion below, A. 118-19 (same due process analysis applied to case at bar). *See also Mathews* v. *Eldridge*, 424 U.S. 319, 334-35 (1976) (same due process analysis applied to claimed deprivations of protected property interests).

Considerations involved in juvenile detention under FCA § 320.5(3)(b) which are not involved in the adult pretrial detention reinforce *Wayburn's* conclusion (39 N.Y. 2d at 691) that New York's interests in the statute outweigh a juvenile's protected interest in pretrial liberty. First, juveniles, in contrast to adults, are always in some form of

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(right to pretrial bail under Eighth Amendment considered and rejected in *dicta*); *Parker* v. *Roth*, 202 Neb. 850, 278 N.W.2d 106, *cert. denied* 444 U.S. 920 (1979) (same Nebraska constitutional provision involved in *Hunt* upheld) (right to pretrial bail under Sixth, Eighth and Fourteenth Amendments considered and rejected); *Huihui* v. *Shimoda*, 64 Hawaii 527, 644 P.2d 968 (1982) (Hawaii statute prohibiting bail for serious crimes if accused is on bail for a felony invalidated as foreclosing judicial discretion to release on bail in appropriate cases).

If the controversy about adult preventive detention is ultimately resolved against the practice, it will not diminish the force of the New York Court of Appeals' holding in *Wayburn* if it is followed. As this Court has observed, juveniles accused of crimes are entitled to fundamentally fair procedures, but they are not entitled to all the rights of accused adults. "There is no automatic congruence between the procedural requirements imposed by due process in a criminal case and those imposed in juvenile cases." *In re Winship*, 397 U.S. 358, 374 (1970) (*Harlan*, J., concurring). *Accord*, *Breed* v. *Jones*, 421 U.S. 519, 533-34 (1975); *McKeiver* v. *Pennsylvania*, 403 U.S. 528, 545 (1971); *In re Gault*, 387 U.S. 1, 22-24 (1966); *Kent* v. *United States*, 383 U.S. 541, 556-57 (1966). Indeed, the Court's decisions recognize that even preferred freedoms may be invaded when, as here, concerns about the ability of juveniles to make self-restrained, mature choices are in issue. *Ginsberg* v. *New York*, *supra* (conviction for selling pornographic literature to minor upheld when First Amendment would have invalidated conviction if sale were to an adult); *Prince* v. *Massachusetts*, 321 U.S. 158 (1944) (conviction for supplying religious literature to minors to sell on the streets upheld).

custody whether at home, at school or in detention under § 320.5(3)(b).* *In re Gault*, 387 U.S. 1, 17 (1967); *Morris* v. *D'Amario*, 416 A.2d 137, 140 (R.I. 1980); *Baker* v. *Smith*, 477 S.W.2d 149, 151 (Ky. 1971); *Pauley* v. *Gross*, 1 Kan. App. 2d 736, 574 P.2d 234, 240 (1977); *Ex parte Sharp*, 15 Idaho 120, 96 P.2d 563, 564 (1908); *Petition of Ferrier*, 103 Ill. 367, 371-73, 42 A.R. 10 (1882); *Ex parte Crouse*, 4 Whart. 9, 11 (Pa. 1839). *See also* testimony of Hon. Margaret Driscoll, A. 325, 327. Second, juvenile detention under § 320.5(3)(b), in contrast to adult pretrial detention, may be either secure or nonsecure. *See* pp. 10-11. The least restrictive environment for the juvenile must be preferred, and the choice is made initially, and monitored during detention, by specialized detention agency personnel who interview the juvenile and review his social history. *See* pp. 10-11 and *Secretary of Public Welfare* v. *Institutionalized Juveniles*, 442 U.S. 640, 648-50 (1979) (mentally disabled juveniles' interest in liberty upon institutionalization satisfied by nonadversarial inquiry, decision and periodic review by mental health professionals); *Parham* v. *J.R.*, 442 U.S. 584, 606-607 (1979) (same). Third, juveniles are more likely to recidivate than adults. *In re Gault*, 387 U.S. at 21-22; *People ex rel. Wayburn (Charles L.)* v. *Schupf*, 39 N.Y. 2d at 688, 689, 690-91.** As a consequence, New York's interest in preventively detaining them is greater than in comparable authority for adults, and the juvenile's opposing interest in pretrial liberty is not as weighty as an

* Intervenor does not suggest that a juvenile's 'in custody' status places his interest in pretrial liberty outside the protection of the Fourteenth Amendment. *See* FCA § 301.1; *People ex rel. Wayburn (Charles L.)* v. *Schupf*, 39 N.Y. 2d at 686-87, and pp. 2-13. *Contrast In re Gault*, 387 U.S. at 16-31. However, the juvenile's status in this regard shows that his transfer from the custody of his parents to the custody of a local detention agency under FCA § 320.5(3)(b) involves only questions of degree, not of kind.

** According to the testimony of appellees' expert in criminology and statistics, the peak period for recidivism after arrest is 3 to 6 months. A. 200-202 (Wilkins). *See* pp. 20-21. The period corresponds with the time a juvenile can be on release before fact-finding, i.e. 90 days at the time of the trial below, now 120 days, if not detained under FCA § 320.5(3)(a) or § 320.5(3)(b) (substantial probability of nonappearance). *See* pp. 8 n.*, 11 n.**.

adult's would be. Last, juveniles are detained under § 320.5(3)(b) for less time than adults are detained before trial. The presentment agency is allowed no more than seventeen days between detention and fact-finding (unless a homicide is charged or a witness is disabled) and must usually proceed in six days. FCA § 340.1(1), (3)(a). *See* p. 32 n.*. In New York, prosecutors of adult pretrial detainees are allowed ninety days from detention in felonies, thirty days in misdemeanors punishable by more than three months and fifteen days in misdemeanors punishable by up to three months. New York Criminal Procedure Law ("CPL") § 30.30(2). In the District of Columbia, prosecutors of preventively detained adults are allowed ninety days from detention. D.C. Code 1981, § 23-1322(d)(2), (4) (statute allowed sixty days when upheld in *United States* v. *Edwards*, 430 A.2d 1321, 1331 n.27 [D.C. App. 1981] [en banc], *cert. denied* 455 U.S. 1022 [1982]).

Every state and the United States permit preventive detention of juveniles accused of crimes. Although the laws of the several jurisdictions vary in their terms, they support, if they do not compel, the conclusion that the effect of FCA § 320.5(3)(b) on a juvenile's interest in pretrial liberty does not offend "some principle of justice . . . rooted in the traditions and the conscience of our people." *Snyder* v. *Massachusetts*, 291 U.S. 97, 105 (1934). *See McKeiver* v. *Pennsylvania*, 403 U.S. 528, 548-49 (1971).* The highest

* Seven states have preventive detention statutes like FCA § 320.5(3)(b) which look to the juvenile's risk of a pretrial crime or a non-criminal offense (conduct not included by § 320.5[3][b]). Ala. Code § 12-15-59 (1982) (clear and substantial threat)*; Conn. Gen. Stat. Ann. § 46b-131(1) (1982 Supp.) (strong probability); Iowa Code Ann. § 232.22(d) (1981 Supp.) (serious risk); La. Code Juv. Proc. Art. 40 (1979) (serious risk); Ariz. Rev. Stats. § 17A (1981-82) (likely); Idaho Code § 16-1811 (1982 Supp.) (likely); Ky. Rev. Stats. § 208.192(4)(c) (1982) (possible).

Eleven states have preventive detention statutes which qualify the pretrial crime or act. Kan. Stat. Ann. § 38-815(b) (1981 Supp.) (dangerous act to self or others); Mich. Comp. Laws Ann. § 712A.15 (1982-83 Supp.) (serious offense); N.H. Rev. Stat. Ann. § 169B:14 (1981 Supp.) (serious bodily harm); N.J. Stat. Ann. § 2A:4-56

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courts of at least six states, in addition to the New York Court of Appeals, have upheld their statutes with specific reference to protecting the juvenile and the community from harmful pretrial conduct, necessarily including pretrial crime. *L.O.W.* v. *District Court of Arapahoe*, 623 P.2d 1253, 1258-59 (Colo. 1981) (detention to protect the juvenile

(1982 Supp.) (serious threat to others); N.C. Gen. Stat. § 7A-574 (1981) (serious injury to others); Tex. Fam. Code Ann. § 53-02 (1982-83 Supp.) (dangerous act)*; Va. Code Ann. § 16.1-248 (1982) (unreasonably dangerous act); Wash. Rev. Code Ann. § 13.40.040 (1982 Supp.) (dangerous act). Three of these jurisdictions qualify both the risk of pretrial crime and the pretrial crime itself. Ala. Code § 12-15-59 (1982) (clear and substantial threat of an act of a serious nature)*; Iowa Code Ann. § 232.22(3) (1981 Supp.) (serious risk of a crime causing serious bodily harm to others); Ky. Rev. Stats. § 208.192(4)(c) (1982) (possible risk of a dangerous act).

Eleven states and the United States have statutes which permit pretrial detention to protect the community and others from the juvenile, necessarily including pretrial crime. Alas. Stat. § 47.10.140 (1982); Col. Rev. Stat. Ann. § 19-2-102 (1981 Cum. Supp.); Conn. Gen. Stats. § 46b-131 (1982); Hawaii Rev. Stat. § 571-31 (1981 Supp.)*; Ind. Ann. Stat. § 31-6-4-5 (1980); Ky. Rev. Stat. § 208.192 (1982); Minn. Stat. Ann. § 260.171 (1982); N.J. Stat. Ann. § 2A:4-56 (1982 Supp.); Or. Rev. Stat. § 419.573 (1981); S.D. Code § 26-8-19.2 (1982 Supp.)*; Tex. Fam. Code Ann. § 53.02 (1982-83 Supp.)*; 18 U.S.C. § 5304*.

Eleven states have statutes which permit pretrial detention to protect the juvenile, his property or the property of others, necessarily including pretrial crime. Cal. Welf. & Inst. Code § 628 (1982); Ga. Code Ann. § 24A-1401 (1982)*; Ill. Rev. Stat. ch. 37, § 703-4 (1982-83 Supp.); Iowa Code Ann. § 232.22 (1981 Supp.); Md. Ann. Code § 3-815(b) & (c) (1982 Supp.); Mont. Code Ann. § 41-5-305(a) (1981); Nev. Rev. Stat. § 62.140 (1981); N.D. Cent. Code §27-20-14 (1981 Supp.); Ohio Rev. Code Ann. tit. 21, ch. 2151(D) (1980)*; Pa. Stat. Ann. § 6325 (1978 Supp.); Va. Code Ann. § 16.1-248 (1982); Wisc. Stat. Ann. § 348.208 (1982-83 Supp.).

Twenty-one states and the District of Columbia have statutes or court rules permitting pretrial detention in the best interests of the juvenile or to protect him, necessarily including pretrial crime. Ala. Code § 12-15-59 (1979)*; Ariz. R. Proc. Juv. Cts. 3(b)(4) (1978); Ark. Stat. Ann. § 45-421(f) (1978); Dela. Fam. Ct. Rule 60 (1980); D.C. Code § 16-2310 (1981); Fla. Stat. Ann. § 39.032(d) (1981); Idaho Code § 16-1811 (1982 Supp.); Kan. Stat. Ann. § 38-16-32(e) (1981 Supp.); Me. Rev. Stat. Ann. tit.

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and the community from serious bodily harm); *Morris* v. *D'Amario*, 416 A.2d at 142 (detention to protect the juvenile and the community); *State* v. *Gleason*, 404 A.2d 573, 583 (Me. 1979) (detention to prevent future harmful acts); *Pauley* v. *Gross*, 574 P.2d at 237 (detention of juvenile dangerous to self or others); *Aubrey* v. *Gadbois*, 50 Cal. App. 3d 470, 123 Cal. Rptr. 365, 366 (1975) (detention to protect the juvenile and the person or property of others); *Baker* v. *Smith*, 477 S.W. 2d at 150, 151 (detention to protect the juvenile from danger).

Since, as just demonstrated, a juvenile's interest in pretrial liberty does not foreclose his preventive detention, all this Court need find to follow the New York Court of Appeals in upholding FCA § 320.5(3)(b) is that juveniles detained under the statute receive the process that is due. *See Ingraham* v. *Wright*, 430 U.S. at 672, 674 (procedures that constitute due process considered after comparison of particular governmental and private interests); *Morrissey* v. *Brewer*, 408 U.S. at 481 (same). The appropriate test

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15, § 3203(4)(c)(5) (1982-83 Supp.); Miss. Code Ann. §43-23-11 (1981)*; Mo. R. Juv. Ct. 111.02 (1982); N.H. Rev. Stat. Ann. 169B:14 (1981); N.M. Stat. Ann. § 32-1-24 (1982 Supp.); N.C. Gen. Stat. § 7A-574(b)(8) (1981); S.C. Code Ann. §20-70-600 (1981 Supp.); Tenn. Code Ann. § 37-214 (1982 Supp.); Utah Code Ann. § 78-3a-30 (1981 Supp.); Vt. Stat. Ann. tit. 31, § 643 (1981); Va. Code Ann. § 16.1-248 (1982); Wash. Rev. Code Ann. § 13.40.040 (1982 Supp.); W. Va. Code Ann. § 49-5-8(d) (1982 Supp.); Wyo. Stat. Ann. § 14-6-206(i) (1980).

Four states have statutes permitting detention in the discretion of the court, necessarily including pretrial crime. Mass. Ann. Laws ch. 19, § 66 (1982); Neb. Rev. Stats. § 43-255 (1982 Supp.); Okla. Stat. Ann. ch. 10, § 1107 (1981-82 Supp.)*; R.I. Gen. Laws §§ 14-1-20, 21 (1981).

All states and the United States appear to permit detention on a finding that the juvenile is not likely to appear in court for fact-finding. *See, e.g.*, FCA § 320.5(3)(a). Nonappearance is not codified in Hawaii,* Massachusetts, Nebraska and Rhode Island.

Intervenor's office surveyed the federal and state jurisdictions referenced above by mail. Forty-four jurisdictions answered the survey, and the references to their statutes are taken from the materials they provided. References for jurisdictions that did not answer, indicated by asterisks, were obtained from the latest state and federal codes locally available.

is fundamental fairness to the juvenile, and it is satisfied.* The § 320.5(3)(b) detention standard is definite, and the juvenile has opportunities to be heard that provide reasonable safeguards against error and are sufficient to support the pretrial restraint of adults for longer periods. *See Ingraham* v. *Wright*, 430 U.S. at 674-75, 678-82 (risk of error and value of other procedures to be considered in deciding what process is due); *Mathews* v. *Eldridge*, 424 U.S. at 335, 343-47 (same); *McKeiver* v. *Pennsylvania*, 403 U.S. at 547-48 (same); concurring opinion below, A. 118, 119, 121-22 (risk of error and value of other procedures considered in case at bar).

B. The procedures for detaining juveniles accused of crimes under New York Family Court Act § 320.5 (3)(b) are fundamentally fair.

When the New York Court of Appeals upheld FCA § 320.5(3)(b) in *People ex rel. Wayburn (Charles L.)* v. *Schupf*, 39 N.Y.2d 682, 690 (1976), it observed that the statute did not "ineluctably involve[] an unconstitutional element of vagueness and speculation" because it required a Family Court judge to evaluate the likelihood of a juvenile's pretrial criminal behavior. This Court has made the same observation about evaluations of the likelihood of crime that are involved in virtually every criminal justice decision, from the imposition of the death penalty to pretrial bail. *Jurek* v. *Texas*, 428 U.S. 262, 274-76 (1976) (opinion of *Stewart, Powell* and *Stevens*, JJ.) (death penalty, bail, sentencing and parole referenced); *Greenholtz* v. *Nebraska Penal Inmates*, 442 U.S. 1, 9-10, 16 (1979) (parole release); *Morrissey* v. *Brewer*, 408 U.S. 471, 480

* This Court has applied a due process test of fundamental fairness in all its prior juvenile justice decisions. *Breed* v. *Jones*, 421 U.S. 519, 530-31 (1975); *McKeiver* v. *Pennsylvania*, 403 U.S. 528, 543 (1971); *In re Gault*, 387 U.S. 1, 12-31 (1967); *Kent* v. *United States*, 383 U.S. 541, 553 (1961). *See Gallegos* v. *Colorado*, 370 U.S. 49, 50-55 (1962); *Haley* v. *Ohio*, 332 U.S. 596, 599-601 (1948).

(1972) (parole revocation); *Rehman* v. *State of California*, 85 S. Ct. 8 (1964) (*Douglas* as Cir. J.) (denial of bail pending appeal); *Fernandez* v. *United States*, 81 S. Ct. 642, 644 (1961) (*Harlan* as Cir. J.) (revocation of pretrial bail).

In contrast, the "traditional due process analysis" (A. 117, 118) offered by the concurring opinion below fastens on the evaluation of the likelihood of crime that FCA § 320.5(3)(b) requires as the reason the statute denies juveniles the process that is due. A. 119-22. The statute is said to fail the risk of error analysis in *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976), because it is without five "readily available limitations" that, if present, would reduce the risk of erroneous judicial detention decisions while reasonably accommodating the state's crime prevention interests. A. 120-21. Accordingly, FCA § 320.5(3)(b) is said to pose an unnecessary risk to a juvenile's protected interest in pretrial liberty. A. 118, 120. The five "readily available limitations" (A. 121) are: particularized predicate crimes; particularized pretrial crimes; 'criteria', e.g. prior crimes, home environment; a standard of proof for the statute's serious risk of crime finding; and a finding at detention of probable cause or of some lesser degree of likelihood that the predicate crime was committed. A. 121-22.*

On examination, the first two limitations assigned by the concurring opinion, particularized predicate and pretrial crimes, are shown to be without constitutional significance, to oppose New York's crime prevention interests in FCA § 320.5(3)(b) and not to improve on judicial decisions under the statute's "all crime" standard; the third limitation, 'criteria', is also shown to be without constitutional

* The majority opinion below relies on the absence of particularized predicate crimes and "criteria" to support its characterization of FCA § 320.5(3)(b) as "unlimited." A. 101-102, 112, 114. The majority also observes an absence of procedural safeguards for the statute but does not elaborate other than to suggest, at odds with the concurrence, that probable cause provided by the delinquency petition (and supporting depositions) and found after adversary hearing (*see* pp. 3 n.*, 11-12) may not be sufficient to support pretrial detention. A. 113 n.34.

significance and not to improve on the statute's "facts and reasons" requirement; and the last two limitations, standard of proof and probable cause, while of constitutional interest, are necessarily resolved in intervenor's favor by the fact that the same procedures used for detention under FCA § 320.5(3)(b) are used to support more extended and severe restraints of adult pretrial liberty. Accordingly, none of the 'absent' limitations the concurring opinion assigns to § 320.5(3)(b) in its *Mathews* analysis serves to invalidate the statute.

New York's significant interest in preventing all juvenile pretrial crime, accepted by the concurring opinion, for purposes of its analysis, as the predicate for constitutionally permissible preventive detention in the first instance (A. 117 n.1), and the "all crime" preventive detention standard in FCA § 320.5(3)(b) are in perfect congruence. The particularized crime standard offered by the concurring opinion (A. 121-22) is inconsistent with the state's "all crime" interest and thus more vulnerable to constitutional attack than FCA § 320.5(3)(b). It also substantially disables the state "function" involved in § 320.5(3)(b) and has no "probable value" since it enhances, rather than diminishes, the risk that a juvenile's pretrial liberty will be erroneously deprived. *Mathews* v. *Eldridge*, 424 U.S. at 335. The last two propositions find direct support in the evidentiary record of this case.

First, the expert witnesses at the trial below who spoke to the point, Judge Quinones, Judge Driscoll and Deputy Commissioner Kelly for intervenor and Dr. Zinn for appellees, agreed that there are certain juveniles who will commit repeated crimes absent societal intervention. A. 244, 250-51, 307, 311-12, 316, 325 and pp. 9 n.*, 21. Judge Quinones further testified that some of these juveniles routinely will appear in court, i.e. they are not detainable under New York's alternative detention provision, FCA § 320.5(3)(b) (substantial probability of nonappearance). A. 250-51. Accordingly, absent bail for juveniles, an option not available in New York (*see* p. 8 n.**) and not well-advised (A. 316-17 [Driscoll]), the adoption of a particularized crime standard does not reasonably accommo-

date New York's crime prevention interests in FCA § 320.5 (3)(b). Indeed, it opposes them since both the juvenile and community are left vulnerable to criminal behavior from which § 320.5(3)(b) would provide greater protection.

Second, as the testimony of Leslie T. Wilkins, an expert statistician called by appellees, establishes, the risk of error in "predicting" future crimes does not diminish with particularization, it increases. A. 199, 202. *See also* A. 72-80 (extended district court discussion on risk of error in predicting dangerous and violent crimes). Accordingly, the particularized crime standard that the concurring opinion says will reduce erroneous judicial detention decisions, in fact, will likely increase them and will result in more erroneous deprivations of juvenile pretrial liberty than the opinion assigns to FCA § 320.5(3)(b).

Last, the concurring opinion's statement that the lists of crimes in the District of Columbia preventive detention statute upheld in *United States* v. *Edwards*, 430 A.2d 1321 (D.C. App. 1981) (en banc), *cert. denied* 455 U.S. 1202 (1982), permits that statute to be characterized as "[i]n marked contrast" to FCA § 320.5(3)(b) (A. 122) is untrue. Reference to the extensive lists of dangerous crimes and crimes of violence for which the District of Columbia statute permits detention (*Edwards*, 430 A.2d at 1324 n.46) and to the 'lists' of crimes for which the juveniles in the thirty-four case histories in evidence were detained (*see* pp. 16 n.**, 18 n.*) show that the crimes on both lists are virtually identical.

The absence of 'criteria' from FCA § 320.5(3)(b) elaborating the serious risk of crime standard is not a source of constitutional infirmity in the statute, nor would the presence of 'criteria' assure improved detention decisions. *Contrast* majority opinion, A. 102, concurring opinion, A. 121. *Kent* v. *United States*, 383 U.S. 541 (1966), is dispositive on both points. *Kent* held that a youth at a "critically important" stage of a delinquency proceeding, transfer from the District of Columbia Juvenile Court, where the maximum penalty for his crime was five years, to an adult criminal court, where the maximum penalty was

death, had been denied fundamental fairness when the transfer order, which the youth had opposed, omitted findings or reasons for the Juvenile Court's action. 383 U.S. at 546, 556, 557. Included in the *Kent* record were the transfer 'criteria' in effect when the Juvenile Court had issued its invalid order (383 U.S. at 565-68) and an indication that they had been rescinded. *Id.* at 546 n.4. On these facts, this Court defined the process due a juvenile at a "critical" preadjudicatory stage of a delinquency proceeding to consist of a hearing with effective assistance of counsel and a "*statement of the reasons*" for the court's action (383 U.S. at 557. Emphasis added.), a requirement identical with the "facts and reasons" requirement § 320.5 (3)(b) incorporates. The Court did not refer to the Juvenile Court 'criteria' as an aspect of the process due, evidently recognizing the elaboration of reasons for decision on the record of a particular case as the only relevant due process concern. Only that elaboration, not the presence or absence of collateral material, protects the accused from "unbridled" judicial discretion by providing him with a reviewable record.

Indeed, bail 'criteria,' analogous in substance and purpose to the detention 'criteria' the majority (A. 102) and concurring (A. 121) opinions find constitutionally required for FCA § 320.5(3)(b), have been specifically recognized as precatory in New York and, perforce, without any constitutional dimension. *See* Practice Commentary to Criminal Procedure Law § 510.30, McKinney's Consolidated Laws of New York, Book 11A, at 16, identifying both New York's bail 'criteria,' i.e. § 510.30(2)(a), added by L. 1970, c. 996, § 1, eff. Sept. 1, 1971, and their source, the federal bail 'criteria,' 18 U.S.C. § 3146(b), as precatory. Notably, the areas for judicial consideration at the pretrial bail stage of a criminal case or the preventive detention stage of a delinquency proceeding are the same, whether written and identified as 'criteria' or whether spoken by individual judges and identified and commonly applied as 'considerations.' *Compare* CPL § 510.30(2)(a)(i) ("prior criminal record," 'criterion' for pretrial bail) and District of Colum-

bia Juvenile Court transfer 'criterion' ¶ 7 (*Kent* v. *United States*, 383 U.S. at 567) ("record and . . . previous contacts") *with* Judge Quinones (A. 263, 267) ('consideration' of "past record" on preventive detention in New York) and Judge Driscoll (A. 319) ('consideration' of "record of prior delinquent conduct" on preventive detention in Connecticut).

FCA § 320.5(3)(b) refers the finding of serious risk of pretrial crime to the circumscribed discretion of the Family Court judge presiding at the juvenile's initial appearance. Applying the statute's terms, the judge must conclude that its preference for release is overcome, make an affirmative "finding" that the juvenile presents a "serious risk" of pretrial crime, and support his finding by "facts and reasons" stated on the record. *See* pp. 7-8. The last statutory requirement, "facts and reasons" stated on the record, satisfies the *Kent* test of fundamental fairness at a critical preadjudicatory stage of a delinquency proceeding. 383 U.S. at 557. However, as the concurring opinion observes in assigning its penultimate deficiency to FCA § 320.5(3)(b), the statute does not include a "burden of proof" that qualifies the serious risk finding beyond the constraints it imposes on judicial discretion. A. 122.

The District of Columbia preventive detention statute (D.C. Code 1981 § 23-1321[a]), upheld in *United States* v. *Edwards*, *supra*, the New York bail statute (CPL § 510.30), and the federal bail statute (18 U.S.C. § 3146) also do not impose burdens of proof on the specifically discretionary evaluations of likelihood of pretrial crime and nonappearance they require. They do, however, impose far more severe and extended restraints on individual liberty than does § 320.5(3)(b). As noted earlier (p. 37), in the District of Columbia, preventively detained adults may be held for ninety days before trial, and in New York, adults who cannot post, or were denied bail, may be held for fifteen to ninety days depending on the potential sentence for the crime charged. All are held in jail. In contrast, juveniles detained under § 320.5(3)(b) may be held for a maximum

of seventeen days (except in extraordinary circumstances *see* pp. 32n.*, 37), and they are held either securely or non-securely under the care of a specialized juvenile agency (*see* pp. 10-11), not in jail.

Notwithstanding the brief and less intrusive nature of juvenile preventive detention in relation to adult pretrial detention, juveniles receive no less procedural rights at initial appearance than adults receive at arraignment where bail is determined. *See* pp. 2-13. Accordingly, were this Court now to add a specific burden of proof to FCA § 320.5(3)(b), juveniles would acquire greater procedural rights than adults although their claim to due process protection is less compelling.

The concurring opinion's last assigned deficiency in FCA § 320.5(3)(b), the absence of a finding at detention of probable cause or of some lesser degree of likelihood that predicate crime was committed, fails for the same reason as its burden of proof contention. The Family Court Act requirements for a probable cause petition at initial appearance, which the juvenile may thereupon challenge for insufficiency, and an adversary probable cause hearing within six days of detention parallel adult rights. *See* pp. 3 n.*, 4 n.*, 5, 11-12. In addition, they substantially exceed the constitutional standard established in *Gerstein* v. *Pugh*, 420 U.S. 103, 114, 120-26 (1975), which permits a similar period of restraint without adversary hearing. *See United States* v. *Edwards*, 439 A.2d at 1335-37 (preventive detainee held six days before probable cause found under *Gerstein*).

C. New York Family Court Act § 320.5(3)(b) does not punish juveniles accused of crimes without trial.

The due process analysis offered by the majority opinion to invalidate FCA § 320.5(3)(b) (reviewed in detail, pp. 23-28) is flawed throughout and must be rejected. The opinion's threshold premise (A. 109) that pretrial detention places the presumption of innocence at risk has been rejected repeatedly. *Bell* v. *Wolfish*, 411 U.S. 520, 532-33 (1979); *United States* v. *Edwards*, 430 A.2d 1321, 1331-33 (D.C. App. 1981) (en banc), *cert. denied* 455 U.S. 1022

(1982); *Sistruck* v. *Lyons*, 646 F.2d 64, 71 (3d Cir. 1981); *Blunt* v. *United States*, 322 A.2d 579, 584 (D.C. App. 1974). The supposed 'matching' comparisons the opinion adopts (A. 111-13) in a search for congruence between detentions under § 320.5(3)(b) and post-trial placements wrongly assume that due process requires different procedural stages in a delinquency proceeding, e.g. detention based on probable cause and fact-finding based on proof beyond a reasonable doubt, to yield equally adverse results, *contrast Baker* v. *McCollan*, 443 U.S. 137, 142-46 (1979), that dispositions of probation for up to three years are 'releases,' inconsistent with nonsecure or secure placements of one year to eighteen months and/or restrictive placements of three to five years (*see* p. 14 n.* & n.**), *contrast Rinaldi* v. *Yeager*, 384 U.S. 305, 309-310 (1966), and that pre-fact-finding detention for up to seventeen days (except in extraordinary circumstances, *see* pp. 32 n.*, 37) is comparable to placement, whether for eighteen months or five years, in the first instance.

The comparisons, in turn, depend on a retroactively applied numerical 'majority' constraint which disregards the "facts and reasons" for detention under FCA § 320.5(3)(b) and the "facts and reasons" for 'release' at disposition in particular cases (*see* pp. 16 n.**, 18 n.*, summarizing "facts and reasons" for detention under § 320.5[3][b] in the thirty-four juvenile case histories appellees provided, and p. 26 n.*, noting dispositional outcomes in twenty, including eleven 'releases' on probation, but without "facts and reasons" because they were not provided) and which does not permit the constitutional validity of any detention under § 320.5(3)(b) to be assessed until the ultimate disposition of the case is known and the year-end statistics for the Family Court have been reported.

In addition, the comparisons are without evidentiary foundation in the record. A. 102 n.18. The Vera Study does not provide any information about detentions under § 320.5(3)(b) as distinguished from § 320.5(3)(a) (substantial probability of nonappearance), and the thirty-four juvenile case histories are not a random sample from which generalizations about all New York juvenile delinquency

proceedings can be drawn. *See* p. 24 n.**. Indeed, the same analytically and factually flawed comparisons were rejected by the New York Court of Appeals in *People ex rel. Wayburn (Charles L.)* v. *Schupf*, 39 N.Y.2d 682, 690 (1976), when it upheld § 320.5(3)(b), then § 739(b), under the due process clause.

Conclusion

For the foregoing reasons, the judgment below should be reversed and New York Family Court Act § 320.5(3)(b) declared constitutional under the due process clause.

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